

DISTRICT COURT, SAN MIGUEL COUNTY, COLORADO Court Address: Box 919, Telluride, Colorado 81435 Court Phone: 970 728-3891	EFILED Document CO San Miguel County District Court 7th JD Filing Date: Nov 8 2010 8:15AM MST Filing ID: 34224288 Review Clerk: Sara R Towsley
MARK V. SHOEN, Plaintiff, v. RONALD WATKINS, et al., Defendants.	COURT USE ONLY
	Case Number: 09CV10 Division: 4
ORDER RE: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT & DEFENDANT SAMUEL SHOEN'S MOTION FOR DETERMINATION OF QUESTION OF LAW	

This matter is before the Court on the above entitled motions. Having reviewed the motions, responses, replies, the file and relevant authorities, the Court deems oral argument unnecessary and enters this order.¹

I. INTRODUCTION

Plaintiff Mark Shoen ("Mark") and Defendant Samuel Shoen, M.D. ("Sam") are the sons of L.S. Shoen, the founder of the U-Haul Corporation. Each son belongs to opposing factions within the Shoen family which has been embroiled

¹ The Turner Defendants have filed an unopposed motion to set oral argument on the pending motions. The Court denies the request because the parties have exhaustively briefed the issues and holding oral argument is not necessary and would add delay and expense.

in a dispute over control of the company. In August, 1990, Sam's wife, Eva Berg Shoen ("Eva"), was found murdered inside the couple's Telluride home. The murder investigation ended with the arrest of Frank Marquis ("Marquis"), who confessed to committing the murder during a botched burglary attempt. The investigation was formally closed when Marquis pled guilty to manslaughter.

Nevertheless, L.S. Shoen made public statements expressing his belief that Mark and his brother, Joe, were either directly or indirectly involved in the murder. Consequently, Mark filed a defamation suit in federal court in Arizona against his father and another brother, Michael Shoen. Sam was not a party to the action. After the federal court found Mark to be a "limited public figure" as a matter of law, the jury returned a verdict in favor of the defendants. *Shoen v. Shoen*, 933 F. Supp. 871 (D. Ariz. 1996), *aff'd*, 113 F.3d 1242 (9th Cir. 1997).

To this date, Sam continues to believe that Marquis did not act alone in his wife's murder. In January, 2008, the development of the murder investigation became the subject of a documentary entitled *Tragedy in Telluride* (hereinafter *Tragedy*), which aired on the cable network truTV, which is owned by Defendant Turner Broadcasting System, Inc. ("Turner"). The program was aired as an episode of *Dominick Dunne's Power, Privilege, and Justice*.

Mark alleges that *Tragedy* creates the false impression that he was somehow involved in the murder. He further alleges that the false innuendo is based mostly on statements made by Sam challenging the official explanation of the murder. Throughout the program, Sam reiterates his theory that certain

individuals conspired to kill his wife and to fabricate the crime scene in a way that would implicate him in the murder. After the program aired, Mark filed the present claims for defamation against Sam and the makers of *Tragedy*, which include Turner, Steven Rivo, Jessica Shreeve, Anthony Horn, Robin Hutt and Down Low Pictures (collectively “Turner Defendants”). Mark has also filed defamation claims against Ronald Watkins (“Watkins”), an author who appears in *Tragedy*, and against Dominick Dunne (“Dunne”), who appears as the host of the program. While this case was pending, Dunne died. The Court allowed a reasonable period for his estate to be substituted. Plaintiff declined the opportunity to do so and now concedes that Dunne has been dismissed from the case. See: Order re Hearing Held 10-27-10.

II. STANDARD OF REVIEW

Defendants have all filed for summary judgment in their favor on the grounds that the statements made in *Tragedy* are constitutionally protected speech. In addition to filing a response brief to the pending motions, Mark has also filed a “notice of errata” which includes an additional affidavit. Such a notice usually informs the Court of an error in a pleading or motion and is not to be used to supplement the record with additional exhibits or affidavits. As such, the “notice of errata” is improper and the Court will not consider it.

The proper standard of review in defamation cases depends upon whether the subject matter of the case involves a matter of public concern or, alternatively, whether the plaintiff is a public figure. Whether a communication is constitutionally protected is a question of law. *Keohane v.*

Stewart, 882 P.2d 1293, 1299 n.8 (Colo. 1994), *cert. denied*, 513 U.S. 1127, 115 S. Ct. 936 (1995).

The Court finds that this case involves a matter of public concern because “[t]he commission of a crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions are without question events of legitimate concern to the public.” *Bowers v. Loveland Publishing Co.*, 773 P.2d 595, 596 (Colo. App. 1988), *cert. denied* (Colo. 1989). The Court also finds that Mark is a limited public figure. This finding is based on two factors: (1) the threshold question of whether the defamatory statement involves a matter of public concern; and (2) whether the level of a plaintiff’s participation in the controversy invites scrutiny. *Lewis v. McGraw-Hill Broadcasting Co., Inc.*, 832 P.2d 1118, 1122 (Colo. App. 1992). Here, Mark is a limited public figure because the statements at issue involve a matter of public concern which has already been the subject of a lengthy defamation suit in federal court. By injecting the circumstances of a highly publicized murder into the judicial system, Mark can no longer claim the status of a private person in this matter. *Id.* (holding that a plaintiff who litigated a matter of public concern in court was a limited public person).

Accordingly, Mark cannot prevail on his claims unless he proves that the defamatory statements are false and were published with actual malice. *DiLeo v. Koltnow*, 200 Colo. 119, 125, 613 P.2d 318, 323 (1980). Whether a publication is defamatory in nature is a question of law. *Gordon v. Boyles*, 99 P.3d 75, 79 (Colo. App. 2004). “Actual malice” means that the statements were

either known to be false or were made with a reckless disregard for the truth. *DiLeo*, 613 P.2d at 321. A plaintiff must prove actual malice by “convincing clarity,” which is similar to the standard of clear and convincing evidence. *Id.* at 323. Unlike most cases in which summary judgment is disfavored, summary judgment is “particularly appropriate” in defamation cases where protracted litigation could have a chilling effect on free speech. *Id.* This means that a plaintiff can only defeat summary judgment by establishing “a prima facie case by a sufficient quantum evidence which can be equated with the standard of convincing clarity.” *Id.* at 324. In addition, it has been held that these constitutional questions, as well as issues relating to the sufficiency of plaintiffs' evidence on the issue of liability should be resolved by the court within the framework of summary judgment. *DiLeo v. Koltnow, supra.*

III. ANALYSIS

The Amended Complaint asserts two related claims for relief. The first is for libel per se against all Defendants for the gist of the program. The second is for libel per se against Sam, Dunne and the Turner Defendants for specific statements appearing within the program. As explained below, the Court finds that the first claim for relief must be dismissed in its entirety because the program, when taken as a whole, does not falsely imply that Mark was responsible for the murder. The Court will also dismiss the second claim for relief against the Turner Defendants and Dunne because all statements made or republished by those parties are constitutionally protected speech. However, the Court will not dismiss the second claim for relief against Sam

because a reasonable viewer could conclude that he intended to accuse Mark of being involved in the murder and his statements are not protected under the fair comment doctrine.

A. The Turner Defendants are Entitled to Summary Judgment

The gravamen of Mark's claim against the Turner Defendants is that *Tragedy* makes the false implication that he was involved in Eva's murder. When a plaintiff alleges a libel by implication regarding a matter of public concern, he must either prove that the broadcast contains or implies a verifiable fact about the plaintiff or that the broadcast is reasonably susceptible to being understood as an assertion of actual fact. *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center*, 879 P.2d 6, 10 (Colo. 1994). The relevant factors for making this determination include: (1) the phrasing of the statements; (2) the context in which they appear; (3) the medium through they are disseminated; (4) the circumstances surrounding publication; and (5) whether the statements imply the existence of undisclosed facts. *Id.* at 11. For example, speculative commentary on a matter of public concern replete with "imaginative expression" and "rhetorical hyperbole" is not actionable and is "particularly worthy of constitutional protection." *Keohane*, 882 P.2d at 1300. The analysis in *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990), provides a useful distinction between an implied libel and a protected communication:

[I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can

reasonably be drawn, the libel is not established. But if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends or endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning.

In essence, the Turner Defendants contend that *Tragedy* is protected as a materially true broadcast because it merely presents alternative theories concerning Eva's murder without endorsing any particular theory or explanation. The program consists of several different segments. The Court will analyze each segment to determine whether the program as a whole conveys a defamatory meaning.

The program is hosted by Dunne and has an anonymous narrator who guides the viewer through the development of the murder investigation. The narrator opens the introduction, "A shocking crime... a billion dollar fortune... accusations that would tear a family apart." Sam first appears in the introduction and says, "They are my brothers, but they are certainly capable of evil things." Dunne concludes the introduction with a splash of sensationalism, "Was it a random crime or the final straw in a vicious family feud... The American dream destroyed by greed."

The first segment begins with a depiction of the murder scene itself. Eva's body was first discovered in her home by her 10 year-old daughter. The investigators arrived, but found no evidence of forced entry and no valuables

had been taken. A .25 mm shell casing was found at the foot of Eva's bed along with a blood stain on the bed sheet. However, a piece of the bed sheet was torn off and was missing. The investigators were first puzzled because there were no fingerprints or other forensic evidence that could be used to identify the killer.

The program continues with a detailed account of the initial investigation. The investigation first focused on Sam, who was in Arizona when the murder occurred. He had a valid alibi and was quickly eliminated as a suspect. When asked if he had any enemies, Sam told the investigators that he was involved in a heated feud with his brothers over the control of U-Haul. At that point, San Miguel County Sheriff Bill Masters was convinced that the murder was not a random act and that there had to be a relationship between Eva and those responsible for her murder. The investigators initially suspected that it might have been a murder for hire.

The program then focuses on the autopsy report which showed no signs of a physical struggle or sexual assault. Instead, the autopsy found two small needle marks on the side of each breast. The program then shows news clips of L.S. Shoen who publicly stated his belief that his sons, Mark and Joe, were either directly or indirectly responsible for Eva's murder.

The investigators traveled to Phoenix to determine if there was any link between the murder and the U-Haul feud. They first interviewed Joe, who was the company's CEO, along with Mark, who is described by the narrator as Joe's "right-hand man." The narrator describes Joe as becoming enraged during the

meeting, believing that the investigation was too one-sided. According to Detective Kim Pound, he asked Mark why he thought someone would kill Eva. Mark replied, "I don't know, shit happens." The interview abruptly ended and Joe had security escort the investigators out of the building. He also forbade them from interviewing any U-Haul employees. At that point, Watkins appears and provides his opinion on Mark and Joe's behavior: "You can act defensively like that because you've engaged in guilty behavior. But you can also behave defensively like that when you think others are going to falsely accuse you. Either explanation fits it, but the response was just bizarre."

Dunne then concludes the first segment, "The Shoens weren't exactly Norman Rockwell material. But a contract hit on an innocent woman? It seemed unthinkable until investigators discovered just how bitter the U-Haul war had become."

The second segment further details the progress of the investigation by describing how U-Haul had hired its own private investigators to look into the murder. Sam recounts his belief that the U-Haul investigators were "feeding information to the sheriff" in order to implicate him. The program then focuses on the founding of U-Haul and the subsequent fight for control of the company. After founding the company, L.S. Shoen routinely gifted shares of stock in the company to his children with the intent that they would eventually own it, but L.S. initially maintained control over the voting rights of those shares. Sam initially had no interest in working for the company and instead became a physician, whereas Joe began working for the company with the intent of

eventually controlling it. According to Watkins, L.S. believed that Joe did not have the temperament to manage the company, so L.S. asked Sam to return and manage the company. Sam describes Joe as becoming upset because “he was not the only game in town.”

The third segment of the program delves deeper into the friction within the Shoen family. According to Sam, Joe falsely claimed that U-Haul was going bankrupt in an effort to make the shareholders believe that L.S. could no longer manage the company. Detective Pound stated that there were rumors of “guns and drugs,” but that the rumors were not substantiated. Watkins then makes the following statement: “Many people who dealt with U-Haul intimately believed that a culture of violence existed as it related to Joe and Mark, and that they were prepared to use extra-curricular methods of intimidation or even physical violence to accomplish their goals.” In 1986, Joe and Mark convinced the shareholders to remove L.S. as chairman. Sam became the CEO and President, and Joe became the chairman of the board. Sam later became disillusioned and sought to leave the company. When Joe refused to allow Sam to sell his interest in the company, Sam left the company and sued Joe in an effort to divest his interest. Sam then describes Joe and Mark as acting in “a completely ruthless fashion,” and further states, “If they are capable of doing that to their own father, they’re certainly capable of evil things.”

The fourth segment begins with Watkins describing a theory that Joe and Mark were pursuing through their own investigators. According to this theory, Sam allegedly murdered Eva and then sped away to Phoenix where he could

construct an alibi. One of the investigators, Sgt. Michael Wescott, expressly rejects this theory due to a lack of evidence. Instead, the investigators continued to pursue their initial theory that someone within U-Haul was responsible, but no connection between U-Haul and the murder could be found.

The investigation had gone cold until Sheriff Masters received a tip from an informant in New Mexico who said that his brother-in-law, Frank Marquis, had identified himself as the murder. Over time, the investigators uncovered the murder weapon and other physical evidence which they linked to Marquis. Even after Marquis was arrested, Sam and L.S. continued to believe that Mark and Joe were involved in the murder. Dunne speaks at the conclusion of the fourth segment: “L.S. and Sam suspected that Marquis was a link in a much bigger chain that would eventually lead back to Joe and Mark. But believe me, not everything was going to play out the way they expected.”

The fifth segment begins by describing law enforcement’s efforts to persuade Marquis to cooperate in the investigation. Sgt. Wescott recounts a time when he obtained a search warrant to test the DNA in Marquis’ hair, but Marquis smothered his hair with mustard in an apparent attempt to thwart the DNA test. Dunne interjects and says, “I don’t care how hard up you are for hair care, innocent men don’t slather their heads in condiments from the prison canteen.” Frank Marquis might not have been talking, but he definitely knew more than he was letting on.”

After a year in jail, Marquis confessed to the murder. During the video-taped confession, Marquis explained that he was burglarizing houses in the Shoens' neighborhood. He entered the Shoens' home and found Eva sitting in her bedroom. He claimed that he shot her after she got up and attacked him. He never implicated anyone else in the crime. The investigators eventually confirmed the fact that several other burglaries had occurred in the neighborhood on the same morning as the murder.

In addition, Sheriff Masters puts to rest any belief that Marquis was part of a greater conspiracy: "It started coming together in my mind that the evidence does in fact fit a random crime... Looking at it from what I know now, it was a murder committed out of complete chaos, with no plan whatsoever." Dunne then concludes the fifth segment: "Remember, everyone thought Eva's murder was the work of an expert hitman... Now it appeared the killer was a small time hood who drove hundreds of miles to break into the Shoens' cabin. But to Sam and his father, L.S., the case was far from closed."

The sixth segment begins with Marquis pleading guilty to first-degree manslaughter. Nevertheless, Sam is still unconvinced that he acted alone: "This story is completely implausible that his intention was to burglarize the house. Well, there were six barking dogs, there were three children, there was a woman and a car in the driveway, and there were lights on upstairs and downstairs, so that makes no sense whatsoever." The narrator also states that Marquis "claimed ignorance" as to the origin of the needle marks over Eva's

breasts. Sgt. Wescott admits that it is “tough to find a logical explanation for those needle marks.”

The narrator then states that “Sam has a theory of his own.” Sam states his theory as follows: “I am a physician, and obviously I had knowledge of drugs, I had access to drugs, I had access to syringes. And if I were being attempted to be implicated in a murder that would be part of doing that.” The narrator then follows, “And there’s another unanswered question: What happened to the missing piece of Eva’s bed sheet? Sam thinks it too was part of the plan to frame him for his wife’s murder.” Sam then continues with his theory: “There was a piece of the bloody sheet on the bed that was cut out and removed. So again, if someone were trying to implicate me in a murder that would have been a valuable piece of evidence to plant. I suspect that the whole thing was staged to implicate me, and that it didn’t work the way they had intended.”

Watkins further attempts to cast doubt on the official investigation: “When policemen and prosecutors have high-profile cases that they’re under enormous pressure to clear, someone like Frank Marquis is manna from heaven. So we can ignore the needle marks, we can ignore the blood stained portion of the sheet, we can forget all of that. Then the case goes away.”

However, Sgt. Wescott immediately appears to refute Sam’s conspiracy theory: “They believe there had to have been some connection to the other side of the family, and, you know, we looked and we just couldn’t find any other, any connection to that side of the family.” Sheriff Masters then follows: “Frank

Marquis is responsible for killing Eva Shoen. He didn't do it for any other reason than his own sick mind, and he confessed to it. There shouldn't be any lingering doubt."

Watkins then comments on the state of the Shoen family: "The conclusion I reached was that in terms of the family, given its history, ultimately it almost didn't matter who did the murder because the suspicions had been there so long were deep rooted that even if it was, as it turned out, an outsider, the family's destroyed anyway."

Dunne concludes the program as follows: "Sam Shoen has moved away from Telluride, remarried and gotten on with his life. But even now, seventeen-years later, he continues to press Sheriff Masters to reopen the case. He still believes that somehow, someday, someone got away with murder."

The presentation of Sam's conspiracy theory is based primarily on three factors that he believes to be unexplained: (1) the presence of two small needle marks over Eva's breasts; (2) a missing piece of the bed sheet from her bed; and (3) the lack of evidence of forced entry or stolen items from the home. Sam stated his belief that the needle marks were in fact injection sites that the killer made for the purpose of leading law enforcement to believe that he, as a trained physician, tried to inject some harmful substance into his wife. He also stated his belief that the missing piece of the bloody bed sheet would have been a good piece of evidence to plant in order to frame him for his wife's murder. Finally, Sam believes that the lack of forced entry or stolen items refutes the

conclusion of law enforcement that Marquis killed Eva during a botched burglary attempt.

Nevertheless, *Tragedy* also casts serious doubts upon the veracity of Sam's conspiracy theory by presenting the conclusions of law enforcement officials who are convinced that Marquis acted alone. The program includes the statements of Sheriff Masters, who states that there "shouldn't be any lingering doubt" that Marquis is solely responsible for the murder and that his only motive was "his own sick mind." The lead investigator, Sgt. Wescott, also discredits Sam's theory by stating, "We could not find any sort of connection with U-Haul to Telluride or to this crime."

The facts in this case are analogous to those in *Ramsey v. Fox News Network, L.L.C.*, 351 F. Supp. 2d 1145 (D. Colo. 2005), a case that dealt with a broadcast concerning the investigation into the unsolved murder of six-year-old JonBenet Ramsey. The child was found dead inside her home along with a three-page ransom note. She was strangled, bludgeoned and sexually assaulted with one of her mother's paintbrushes. The nationally televised broadcast highlighted the belief by detectives that the child's family might have been responsible for the murder because they were the only ones in the home at the time of the murder. The detectives were also suspicious because of the unusual length of the ransom note and the length of time the killer spent inside the home placed considerable doubt upon the theory that the child was killed by a random intruder.

The Ramsey family sued for defamation claiming that the broadcast implied that they were responsible for the murder. However, the district court dismissed the claim because “the broadcast did not make any judgment as to who was involved in the murder nor did it urge any provably false factual connotation suggesting that plaintiffs were complicit in any crime.” *Ramsey*, 351 F. Supp. 2d at 1152. Rather, the broadcast simply detailed the factual premise behind the detectives’ initial suspicions concerning the family’s potential involvement in the murder and further emphasized that the focus of the investigation was pointing away from the family.

Likewise, *Tragedy* is similar to the broadcast in *Ramsey* because it neither endorses nor advocates in favor of Sam’s conspiracy theory, but simply juxtaposes that theory against the findings of the official investigation. While the program attempts to sensationalize the murder by injecting an element of mystery into the investigation, it does not rise to the level of defamation by implication.

To the contrary, the presentation of Sam’s theory is mostly based on true facts. The program explains how the investigators initially suspected foul play on the part of Sam’s relatives since the murder occurred in the wake of an intra-family struggle over the control of U-Haul. As the investigation unfolded, U-Haul hired its own investigators in an apparent effort to link Sam to the murder. Furthermore, there is no dispute that the coroner found two small, bilateral needle marks on the corpse which have not been explained. The autopsy report itself described the needle marks as “injection sites,” even

though the investigators later determined that the marks were “very shallow” and did not contain any evidence of a foreign substance. There is also no dispute that a piece of the bed sheet was in fact missing from the crime scene. Ultimately, the program explains how Marquis eventually emerged as the sole suspect while making it clear to the viewer that Sam’s theory is not supported by the findings of the official investigation.

Mark maintains that the program is materially false because it did not include Marquis’ explanation as to why he removed the piece of bed sheet. According to the investigation, Marquis told law enforcement that he removed a portion of the bed sheet because he saw blood on it which he believed to be his own. *Plaintiff’s Response Brief, Exhibit B*. However, the omission of this fact alone does not make the program defamatory. *Mohr v. Grant*, 153 Wash. 2d 812, 827, 108 P.3d 768, 776 (2005) (“Merely omitting facts favorable to the plaintiff or facts that the plaintiff thinks should have been included does not make a publication false and subject to defamation liability.”). A mere omission of certain facts does not constitute a libel unless it “has made a material assertion of fact untrue.” *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 648 (8th Cir. 1985). “A broadcaster’s omission of facts may be actionable if it so distorts the viewers’ perception that they receive a substantially false impression of the event.” *Huckabee v. Time Warner Entertainment Co., L.P.*, 19 S.W.3d 413, 425 (Tex. 2000).

Here, the omission of Marquis’ explanation for the missing bed sheet is not material. Even if the program had included that piece of information, it would

not have conveyed a materially different meaning. The program makes it clear that Marquis confessed to the murder and that law enforcement is convinced that he acted alone. For example, the program broadcasts the conclusion of Sheriff Masters and his investigators that the murder was not planned and was committed by Marquis alone. It is clear to the viewer that Sam's theory of the murder is not supported by the findings of law enforcement. While the inclusion of Marquis' explanation of the missing bed sheet would have provided a more complete presentation, the omission of this fact does not distort the viewer's impression of the course of events to such a degree as to create a false impression. Furthermore, the inclusion of this information would not have completely eliminated the sense of mystery surrounding the murder investigation because (1) there was no evidence of forced entry or stolen items from the Shoens' home; and (2) law enforcement could not find a logical explanation for the needle marks on Eva's body.

The overall substance of *Tragedy* does not convey a defamatory meaning because it accurately depicts two competing theories regarding Eva Shoen's murder without endorsing either theory. While *Tragedy* may have omitted certain relevant facts, this does not make the program defamatory. See *White*, 909 F.2d at 525 ("Newspaper reporters should not be required to report the results of investigative journalism with a precision establishing an exhaustive, literal picture of what transpired."). In essence, *Tragedy* is not defamatory because it simply reports the actual facts of how the investigation evolved from an initial focus on the Shoen family to the final conclusion that Marquis acted

alone. *Tragedy* is not actionable because it does not convey the impression that Mark Shoen was in fact involved in the murder. At most, it simply raises questions about the official investigation and allows the viewer to draw his own conclusions. See *Thomas v. Los Angeles Times Communications, LLC*, 189 F. Supp. 2d 1005, 1013 (C.D. Cal. 2002) (no defamation by implication where publication “raises...questions by setting forth Plaintiff’s version of events along with those of other witnesses and historical records”).

A showing of libel by implication cannot be made if the harm to a party’s reputation “is the result of a materially accurate report of historical fact.” *Janklow*, 759 F.2d at 649. While the question of whether a publication is substantially true is usually left for the jury to decide, a court may still decide the issue as a matter of law when the material facts reported are not contested. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993). While Mark generally alleges that the program “is dominated by false statements of fact,” he does not dispute the following facts contained within the program: (1) the murder occurred when the Shoen family was still involved in a bitter fight over control of U-Haul; (2) there were no signs of forced entry or stolen valuables; (3) law enforcement initially focused on Mark and Joe as possible suspects; (4) the missing piece of the bed sheet was never found and the cause of the needle marks on Eva’s body is unknown; (5) U-Haul hired its own private investigators; (6) L.S. Shoen publicly accused Mark and Joe of being responsible for the murder; (7) the investigators shifted their focus to Marquis based on an anonymous tip; (8) the investigators have concluded that Marquis

was solely responsible for the murder; and (9) Sam still believes that others were involved in the murder and that his belief is at odds with the official investigation.

Since these material facts are not disputed, the Court finds as a matter of law that *Tragedy* does not convey a defamatory meaning because it is a materially accurate report of how the investigation into Eva's murder evolved over time. While the program presents Sam's belief that his brothers may have been responsible for his wife's murder, the program makes it clear that his conspiracy theory is contradicted by the findings of the official investigation. Even if the program diminished Mark's reputation in the eyes of the viewer, it is not actionable because it is substantially true.

Mark maintains that the program is not substantially true because Sam's false statements are more damaging to his reputation than the truth. *Green v. CBS Inc.*, 286 F.3d 281, 283 (5th Cir. 2002), *cert. denied*, 537 U.S. 887, 123 S. Ct. 132 (2002) ("A broadcast is substantially true if the allegedly defamatory statement is not more damaging to the plaintiff's reputation, in the mind of the average person, than the truthful statement."). The basis of this argument is that the false implication by Sam that Mark was involved in the murder has made him worse off than if the program had not included Sam's statements. However, the Turner Defendants need not show that Sam's allegations are true, but only that the allegations were made and accurately reported. *Id.* at 284; *see also Partington v. Bugliosi*, 56 F.3d 1147, 1156-7 (9th Cir. 1995) ("[W]hen an author outlines the facts available to him, thus making it clear that the

challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.”). The program is not defamatory because the viewer is made aware that law enforcement unequivocally cleared Mark as a possible suspect. *Ramsey*, 351 F. Supp. 2d at 1152 (“A statement that detectives once said they had good reason to suspect someone now unequivocally cleared of having committing a crime is insufficient to meet the high threshold for defamation *per se*.”).

Here, *Tragedy* is not defamatory because it accurately depicts Sam’s theory about the murder without endorsing it. The program juxtaposes Sam’s theory with the findings of law enforcement which clearly exculpate Mark. Ultimately, the viewer is left to decide for himself whether Sam’s theory has any merit. Contrary to Mark’s position, the gist of the program does not convey a defamatory meaning. Therefore, the Turner Defendants are entitled to summary judgment on the first claim for relief. For the same reasons, the first claim for relief is dismissed as to all Defendants as well.

The Court also finds that the Turner Defendants are entitled to summary judgment on the second claim for relief. According to the Amended Complaint, the Turner Defendants are liable for publishing the following statements:

But despite Marquis’ sworn confession, Sam Shoen and others still believe U-Haul must have been involved.

[Sam Shoen] still believes that somehow, some way, someone got away with murder.

The Court finds that the Turner Defendants are not liable for the aforementioned statements because they are substantially true. There is no dispute that Sam still believes that Marquis did not act alone. A party cannot be held liable for simply reporting the truth. *Green*, 286 F.3d at 284 (“In cases involving media defendants, such as this, the defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported.”).

B. Watkins is Entitled to Summary Judgment

Likewise, the Court finds that Watkins is also entitled to summary judgment. Although Watkins makes some statements that cast some doubt on the veracity of the official investigation, Watkins does not specifically implicate Mark in the murder. In fact, at the end of the program Watkins seems to acknowledge that the murder was committed not by a member of the Shoen family, but by an “outsider.” The Court finds that Watkins’ statements, when taken in their totality, did not convey a defamatory meaning.

C. Sam’s Motion for Summary Judgment is Denied as to the Second Claim for Relief

As stated above, the first claim for relief is dismissed as to all Defendants because the gist of the program is not defamatory. However, the Court is not convinced that Sam is entitled to summary judgment on the second claim for relief as it pertains to the specific statements he made during the course of the program.

Sam moves for summary judgment on the following grounds: (1) Mark's claims are barred by collateral estoppel; (2) Sam's statements are constitutionally protected because he expressed his opinion of the murder based on true facts; and (3) Sam did not expressly accuse Mark of committing the murder.

The Court first rejects Sam's argument that Mark's claims are barred by collateral estoppel based on the jury's findings in the Arizona case. Collateral estoppel applies only if the issue is identical to an issue actually and necessarily decided in a prior proceeding. *City & County of Denver v. Block 173 Assoc.*, 814 P.2d 824, 831 (Colo. 1991). Collateral estoppel does not apply in this case because the Arizona case did not decide the issue of whether Sam defamed Mark by implicating him in Eva's murder. The Arizona case involved statements made by other family members. Therefore, the issues in the two cases are not identical.

Sam further contends that his statements are protected under the "fair comment" doctrine. This doctrine covers a statement which "concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm." *Keohane*, 882 P.2d at 1298. The following factors must be considered in determining if a statement is a fair comment: (1) whether the statement is sufficiently factual to be susceptible of being proved true or false; and (2) whether reasonable people would conclude that the assertion is one of fact. *Id.* at 1299. This inquiry is based on the following: the phrasing of the

statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a determination of whether the statement implies the existence of undisclosed facts which support it. *Living Will*, 879 P.2d at 11.

The following test is also useful in determining whether a statement is a constitutionally protected opinion:

A statement of fact is not shielded from an action for defamation by being prefaced with the words “in my opinion,” but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.

Haynes, 8 F.3d at 1227.

The Court finds that Sam’s statements, when taken in their totality, are sufficiently factual to be susceptible of being proved true or false and that a jury could reasonably construe them as statements of fact and not opinion. Furthermore, while Sam does not expressly accuse Mark of committing murder, it is clear from the context of his statements that he intended to implicate Mark in the murder. Specifically, Sam expressly rejected the notion that Marquis was solely responsible for the murder despite the fact that he confessed to being the lone killer. Furthermore, Sam discussed in length his belief that his brothers tried to implicate him in the murder and that they were “capable of evil things.” This enables the viewer to conclude that Sam intended

to accuse his brothers of conspiring to kill his wife. The fair comment doctrine does not apply here because “[a]ccusations of criminal activity, even in the form of opinion, are not constitutionally protected.” *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 382, 366 N.E.2d 1299, 1307 (1977), *cert. denied*, 434 U.S. 969, 98 S. Ct. 514 (1977) (*cited with approval in Burns v. McGraw-Hill Broadcasting Co., Inc.*, 659 P.2d 1351, 1359 (Colo. 1983)).

Sam maintains that his statements are constitutionally protected under the holding in *Living Will*, but the facts in this case are distinguishable. In that case, a medical ethicist stated that a living will product was a “scam” and that those who purchased it were being “taken.” The Supreme Court held that the statements did not contain or imply verifiable facts because the comments simply conveyed the speaker’s subjective belief concerning the value of the product and there was no implication that the plaintiff had committed fraud. *Living Will*, 879 P.2d at 12. Furthermore, the statements were entirely based on facts disclosed in the broadcast and did not imply the existence of undisclosed facts. *Id.*

Conversely, Sam’s statements concerning Mark’s potential involvement in the murder imply a verifiable fact. Furthermore, Sam’s statement that his brothers are “capable of evil things” could imply the existence of undisclosed facts. While this may not be the case, the Court must construe all inferences on summary judgment in Mark’s favor and it is conceivable that Sam’s remark about his brothers is based on something more than what was disclosed during the program. For Sam to say that his brothers are “capable of evil things”

suggests that he may have a personal bias against Mark that was not fully disclosed to the viewer. Ultimately, a viewer could reasonably construe Sam's statements to imply criminal conduct on the part of Mark which goes beyond the realm of opinion.

Mark also must show "by convincing clarity" that Sam made the statements with actual malice. *DiLeo*, 613 P.2d at 323. Given the undisputed animosity between Sam and Mark, the history of the family feud, and Mark's sworn statement that Sam hates him, and taking this evidence in the light most favorable to Mark, the court concludes that actual malice has been shown for purposes of summary judgment. Therefore, the Court will not grant summary judgment in Sam's favor on the second claim for relief.

D. Sam's Statements are Libelous Per Se

Sam has also filed a Rule 56(h) motion wherein he seeks the following determinations of law: (1) that his statements, if actionable, are libelous per quod; (2) the case involves a matter of public concern; and (3) Mark is a limited public figure. The Court has already addressed the latter two issues above and has found that the case involves a matter of public concern and that Mark is a limited public figure.

The Court also finds that Sam's statements are libelous per se. A statement is defamatory per se if it imputes criminal conduct. *Gordon*, 99 P.3d at 79. "[I]f the defamatory meaning may be understood only in reference to extrinsic facts known by the recipient, then the publication is defamatory per quod." *Id.*

Damages are presumed if the publication is defamatory per se and a plaintiff need not plead special damages in order to sustain a claim. *Id.*

Sam contends that the statements are defamatory per quod because it is “not facially evident” that the statements concern Mark. The basis of this argument is that none of the statements made in *Tragedy* accuse Mark by name of committing murder. However, a statement is made concerning a person “to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer.” *Keohane*, 882 P.2d at 1300 n.10. Libel per se does not require that the publication be specifically directed at the plaintiff. *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 896 (Colo. 2002).

Here, a person could reasonably understand that Sam intended to implicate Mark in his wife’s murder based on Sam’s statement that his brothers are “capable of evil things.” This statement was made within the context of Sam’s other statements where he expresses his belief that Marquis was part of a greater conspiracy to implicate him in the murder. Anyone who hears Sam’s statements can reasonably conclude that he intended to accuse Mark of being involved in this conspiracy. There is no need to refer to extrinsic facts known by the recipient in order to conclude that Sam’s conspiracy theory concerns Mark. Therefore, the Court concludes that the statements are defamatory per se.


Based on the foregoing, IT IS ORDERED that the Turner Defendants’ Motion for Summary Judgment is granted and the claims against them are hereby dismissed with prejudice.

IT IS FURTHER ORDERED that the Motions for Summary Judgment filed by Watkins is granted and the claims against him are dismissed with prejudice.

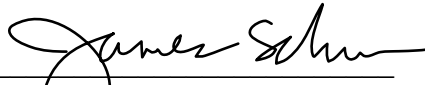
IT IS FURTHER ORDERED that Sam Shoen's Motion for Summary Judgment is granted as to the first claim for relief, but is denied as to the second claim for relief.

IT IS FURTHER ORDERED that Sam Shoen's Motion for Determination of Question of Law is granted in part and denied in part as stated above.

IT IS FURTHER ORDERED that counsel for Plaintiff and Defendant Shoen shall confer regarding the length and timing of the trial previously set. Within 30 days Plaintiff's counsel shall arrange a conference call with counsel for Defendant Shoen and the Court to discuss the length and timing of the trial. The Court will also need to reschedule the TMC currently set for July 8, 2011 because of another matter. The Court can be contacted at 970 252-4354.

DATED this  day of November, 2010.

BY THE COURT:


James W. Schum
District Court Judge