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October 13, 2014

**VIA CERTIFIED MAIL, RECEIPT**

**And EMAIL: [info@caseylawoffice.us](mailto:info@caseylawoffice.us)**

Stephen Casey  
Casey Law Office, P.C.  
595 Round Rock West Drive, Suite 102  
Round Rock, Texas 78681

RE: Don Zimmerman lawsuit threat to The Austin Bulldog

Dear Mr. Casey,

This law firm has been retained to represent The Austin Bulldog regarding the matters in your letter (attached) of October 10, 2014 threatening a defamation lawsuit by your client Don Zimmerman and “Austinites for Zimmerman,” unless The Austin Bulldog “retracts” its story published on October 9, 2014, “Candidate Lost Custody Over Abuse.” I note that you are representing Mr. Zimmerman in this retraction demand regarding The Austin Bulldog story about the divorce proceedings, proceedings in which were also Mr. Zimmerman’s attorney of record (as least as of March 10, 2014), and that you serve as Mr. Zimmerman’s campaign treasurer in his race for Austin City Council.

**Summary of Response**

This letter will address each issue you raised in your letter, but The Austin Bulldog declines to retract its story. The story is a fair, true, and impartial account of the recent court proceedings and public court records involving Don Zimmerman, and as such is, by law, privileged and not a ground for a libel action. Tex. Civ. Prac. & Rem. Code § 73.002. Mr. Zimmerman threatens to sue this journalist for reporting and disclosing public court records. Such a lawsuit would be groundless on its face.

Aside from this “fair report privilege” of the Zimmerman judicial proceedings, The Austin Bulldog’s story does not assert the truthfulness of the allegation of abuse or grounds for the loss of usual parental rights. The Austin Bulldog reported the evidence in the court record, gave you and Mr. Zimmerman a full opportunity to comment and published his comments in the story. Importantly, on the central complaint in your letter (that “Mr. Zimmerman did not lose custody over abuse.”), there is a court finding to that effect. The Second Amended Petition to Modify Parent-Child Relationship, filed June 9, 2014, contains this core material allegation:

Respondent [Zimmerman] has a history or pattern of physical and emotional abuse directed against M.Z. Petitioner [the mother] requests the Court to deny Respondent access to the child.

The requested modification is in the best interest of the child.

Second Amended Petition at 2, paragraph 7.

Then, on June 16, 2014, the Court made a “Finding” in the Agreed Order in Suit to Modify Parent-Child Relationship:

*Findings*

The Court finds that the material allegations in the petition to modify are true and that the requested modification is in the best interest of the child....

Agreed Order at 2 (emphasis added).

*Possession and Access*

1. *Possession Order*

The parties have agreed that it is in the best interest of the child that Respondent not have possession of or access to the child, M.Z.

IT IS THEREFORE ORDERED that DONALD SHELLY ZIMMERMAN shall have no possession of or access to the child, M.Z.

Agreed Order at 6 (emphasis added). I would also point out that you signed the Order approving its form *and Mr. Zimmerman* signed this Order, “APPROVED AND CONSENTED TO AS TO BOTH FORM AND SUBSTANCE.” Agreed Order at 10 (emphasis added). Only now that the Order is disclosed publicly is Mr. Zimmerman, or you, seem to be questioning the content of the Order.

Mr. Zimmerman is quoted in The Austin Bulldog story as saying he had never been shown the court records that included allegations of abuse by him of his daughter. As his attorney of record at the time these affidavits and medical records were filed on June 9, 2014, you are in a better position to know what court filings Mr. Zimmerman was shown prior to agreeing to the June 16, 2014 Agreed Order Mr. Zimmerman signed.

Not only is the story of the Court’s proceedings and findings privileged from a claim for libel, the story is also a communication exercising The Austin Bulldog’s right of free speech and free press, rendering any litigation action that Mr. Zimmerman may take subject to the Texas Anti-SLAPP statute, including an award for The Austin Bulldog against Mr. Zimmerman for damages, attorney fees, costs, and sanctions in an amount the Court finds sufficient and necessary to deter Plaintiff from bringing similar actions. Tex. Civ. Prac. & Rem. Code, ch. 27.

It does appear from Mr. Zimmerman's demand letter and threats to others who have reported on The Austin Bulldog's story, that what Mr. Zimmerman really wants is to deny The Austin Bulldog and the press at large their right to report on the judicial proceedings in which he was recently involved, even if, as The Austin Bulldog did, the report is a "fair, true, impartial account" of the court proceeding; the court records are provided to the readers to evaluate for themselves; Mr. Zimmerman's rebuttal comments are included in the story; and the reporter takes no position about the accuracy of the court evidence or appropriateness of the Court's findings and orders. No self-respecting journalist will succumb to such a threat, and Texas law is written to protect journalists from such threats.

### **The Austin Bulldog**

The Austin Bulldog is the assumed name for the Austin Investigative Reporting Project, a Texas nonprofit corporation. The Austin Bulldog is an online periodical news site for investigative reporting. The Austin Bulldog is a member of the Investigative News Network, LION Publishers (Local Independent Online News Publishers), and its manager Ken Martin is a member of the Society of Professional Journalists and Investigative Reporters and Editors.

### **Applicable Law**

The Austin Bulldog wrote this story, without malice, and merely to inform the public of this issue of public concern about a candidate for the Austin City Council. Writing about this court proceeding is privileged under Texas law.

Sec. 73.002. PRIVILEGED MATTERS. (a) The publication by a newspaper or other periodical of a matter covered by this section is privileged and is not a ground for a libel action. This privilege does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern.

(b) This section applies to:

(1) a fair, true, and impartial account of:

(A) a judicial proceeding, unless the court has prohibited publication of a matter because in its judgment the interests of justice demand that the matter not be published ....

Tex. Civ. Prac. & Rem. Code § 73.002.<sup>1</sup>

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<sup>1</sup> We note that the docket record of this case contains no order or any motion to seal any part of the record.

Case law supports The Austin Bulldog's privilege from the threat of libel contained in your letter. The Austin Bulldog accurately reported about and provided copies of the court records on which the report was based.

"The defendant asserting the statutory privilege is not required to prove the truth of the allegations that it repeats to its readers. Rather, it need only prove that the statements in the article are a "fair, true, and impartial" account of the trial record." *Texas Monthly, Inc. v. Transamerican Natural Gas Corp.*, 7 S.W.3d 801, 806 (Tex. App.—Houston [1<sup>st</sup> Dist] 1999).

The gist of The Austin Bulldog's report is substantially true and, contrary to your semantic disagreements with the report, the report passes the substantial truth test. "The substantial truth test involves consideration of whether the alleged defamatory statement was more damaging to the plaintiff's reputation in the mind of the average listener than a truthful statement would have been." *Klentzman v. Brady*, No. 01-11-00765-CV, 2013 WL 5655845 at \*11 (Tex.App.—Houston [1 Dist.] Oct. 17, 2013). In determining whether a publication is defamatory, the reviewing court must look at the entire publication rather than at individual sentences or portions of the communication. See *Schauer v. Memorial Care Systems*, 856 S.W.2d 437, 446 (Tex.App.—Houston [1st Dist.] 1993, no writ).

Also, pursuant to section 73.005 of the Act, "The truth of the statement in the publication on which an action for libel is based is a defense to the action." Tex. Civ. Prac. & Rem. Code § 73.005.

The Texas Anti-SLAPP statute applies in this case as well. That statute says in part:

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

Tex. Civ. Prac. & Rem. Code §§ 27.002 – 27.003. Section 27.009(a) provides:

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

### **The Austin Bulldog's Report on the Zimmerman Court Records**

You complain that Mr. Zimmerman did not “lose custody over abuse.” You make this complaint despite the Court’s “Finding,” as true, the material allegations made by the mother’s petition (which included the allegation of physical and emotional abuse of the child and medical records from the daughter’s physician) and the Court’s Order that Mr. Zimmerman “shall have no possession of or access to the child.”

The Court’s Order is also relevant to your complaint that Mr. Zimmerman did not, as The Austin Bulldog reported, “lose parental rights.” Most reasonable people would consider the loss of possession of or access to one’s child as a loss of parental rights.

Despite the understandable embarrassment this Court Order may cause Mr. Zimmerman he has no right to threaten a journalist who reports about this judicial proceeding in the fair, true, and impartial matter that The Austin Bulldog reported. The embarrassment would not have been diminished had The Austin Bulldog reported that Mr. Zimmerman “lost ‘possession and access’ to his daughter after a court found allegations of abuse as true.”

You complain, “No court order or opinion of any kind ever states that Zimmerman alienated his daughter.” In your own filing on March 10, 2014 for Mr. Zimmerman <sup>2</sup> you said, “Respondent’s relationship with the minor child has become fairly non-existent.” The affidavit attached in support of the Second Amended Petition for Modification also includes evidence that Mr. Zimmerman alienated his daughter. The court records about the alienated relationship between Mr. Zimmerman and his daughter, including your filing, were fairly reported by The Austin Bulldog’s story.

You complain that, in reporting on the court filings, The Austin Bulldog reported “hearsay.” First of all, The Austin Bulldog explained in the story what the source was for every statement made in the story and even went so far as to attach the Court records on which the story was based. You complain that The Austin Bulldog “omitted many facts and cherry-picked many documents of the hundreds of pages in this case to defame Mr. Zimmerman.” I have reviewed the court records attached to the story. In addition to the Divorce Decree and the Agreed Temporary Injunction, the records disclosed by The Austin Bulldog are complete for substantive filings made this year, starting with your filing of the Respondent’s Motion to Enter Final Order on March 10, 2014. All of the remaining court records and orders that were the basis of the story were included.

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<sup>2</sup> Respondent’s Motion to Enter Final Order.

## **Response to Complaint of Using Child's Name**

Under the heading "Preliminary Statement" in the retraction demand letter, you complain about The Austin Bulldog using Marina Zimmerman's name. First of all, prior to publication, The Austin Bulldog obtained written permission from the daughter's mother and Sole Managing Conservator, Kateryna "Katya" Bochenkova, to use Marina's name in the story. Second, Marina's name also appears in the public court documents, including, for example, the Agreed Temporary Injunction (2/16/2011) and the Petition to Modify Parent-Child Relationship of the same date. You also complain about the release of "personal medical information" about Marina, apparently referring to the public court record, dated 2/14/2011, of the business records affidavit and attached physician progress notes recording Marina's complaints of physical abuse by Don Zimmerman. Other identifying information about Marina was redacted and not included in the story.

I also note that Mr. Zimmerman uses his daughter's full name on his campaign website, saying, "I have one remarkable teenage daughter, Marina Lorna Zimmerman." See <http://www.austinities-for-zimmerman.com/pages/about-don-zimmerman-for-austin-city-council-district-6.html>

Don Zimmerman lacks any standing to make any complaint about The Austin Bulldog's use of Marina's name or disclosure of court documents alleging abuse of his daughter.

### **Request for Clarification of Complaint by "Austinities for Zimmerman"**

In your retraction demand letter, you indicate your office represents "Austinities for Zimmerman," that I assume is some sort of political action committee. However, after a careful search of the Austin City Clerk's election records and the Texas Ethics Commission records, I could not locate any campaign treasurer filing or campaign finance report for such a committee. The only campaign filing I could locate was Don Zimmerman's appointment, as an individual candidate, of you, Stephen Casey, as his campaign treasurer for his individual campaign. As you are aware, it is unlawful for a person or entity such as "Austinities for Zimmerman" to solicit or spend campaign funds without first filing a campaign treasurer designation.

A Google search of the committee name did turn up a website at which the public is invited to "Donate to Austinities For Zimmerman City Council District 6" and "Contribute today to "Austinities For Zimmerman"; let's send the only candidate ever to fight and abolish a City of Austin tax to represent us at the Council!" at:

<https://secure.piryx.com/donate/r0JrRLyN/Austinities-For-Zimmerman/>

Other than claiming that you represent this organization/committee "Austinities for Zimmerman," your retraction demand letter does not indicate how The Austin Bulldog story implicates any rights this organization may have and fails to meet the standards of notice, as to that entity, required by Tex. Civ. Prac. & Rem. Code § 73.055. If "Austinities for Zimmerman"

has standing for a complaint about The Austin Bulldog story, please provide proper notice of their concerns or complaints.

Without additional information, we are unable to fathom what this organization, “Austinites for Zimmerman” has to do with a personal claim of libel by Mr. Zimmerman, unless it is merely cover to pay for attorney fees using campaign funds.

**Request for Information Pursuant to Tex. Civ. Prac. & Rem. Code § 73.056**

To further evaluate your claim and also to add to The Austin Bulldog report any official material you believe should have been included in the report (and links to court records), The Austin Bulldog requests that, within the statutory deadline of 30 days, provide the following information. Appropriate (fair, true, and impartial) material you provide will be added to The Austin Bulldog story in the same manner as the original story. Your retraction demand letter and this response will also be added to the story.

1. Your letter, last paragraph on Page 2, says that a “full transcript” was attached to the letter, but that transcript was omitted from the copy The Austin Bulldog received on October 10<sup>th</sup> attached to your email. Please provide the full transcript of the court proceeding referenced in the retraction demand letter.
2. Please provide any court records from Cause No. D-1-FM-05-00710 that you claim were omitted from inclusion in The Austin Bulldog story that you allege demonstrates the falsity any defamatory statement included in the story.
3. Please identify any allegedly false statement that The Austin Bulldog story made affecting the rights of “Austinites for Zimmerman” and provide documentation of the falsity of any such alleged statement.

Despite there being no legal requirement that it do so, The Austin Bulldog will consider iterations in the story to deal with the semantic issues you raise in the retraction demand letter. We expect to accomplish those changes within the next day or so.

In the meantime, you are welcome to call me at 512 457-9838 to discuss this matter or email me or [Aleshire@R-ALaw.com](mailto:Aleshire@R-ALaw.com).

RIGGS ALESHIRE & RAY, P.C.



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Bill Aleshire

Cc: Client