

DON ZIMMERMAN,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	
	§	TRAVIS COUNTY, TEXAS
AUSTIN INVESTIGATIVE REPORTING	§	
PROJECT d/b/a THE AUSTIN BULLDOG,	§	
and KEN MARTIN,	§	
	§	
Defendants.	§	53 RD JUDICIAL DISTRICT

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO DISMISS**

TO THE HONORABLE AMY CLARK MEACHUM:

I. This Lawsuit Should be Dismissed With Prejudice Under the TCPA.

The Plaintiff's response is long on accusations of nefarious motives, but short on evidence and supporting law. The Defendants will not dignify baseless attacks with a reply, other than to note that the Plaintiff is so far off-base that he accuses a non-profit entity *that does not accept advertising* of having the "crass business goals of increasing advertising rates ..." Resp. at 2. Abusive rhetoric cannot hide the absence of any grounds for suing *The Austin Bulldog*.

A. *The Austin Bulldog* met its Chapter 27 burden.

The Defendants easily met their Chapter 27 burden by showing that this lawsuit attacks their exercise of the right to free speech and to petition, as defined by the Texas Citizens Participation Act ("TCPA"). *See* Motion at 4-6. While Zimmerman's response claims that he disputes that the *Bulldog* article reported on a matter of public concern, *see* Resp. at 4, but the response contains no argument that the Defendants did not meet their Chapter 27 burden. *Id.* at 1-9. In passing, Zimmerman does refer to his custody proceeding as "a years-old family law matter," Resp. at 2, but this does not rebut the showing that this lawsuit targeted free speech rights, for several reasons.

First, the custody issue was not, in fact, “old.” Zimmerman was accused of child abuse in February 2011, just three years before he declared himself a candidate for Austin City Council. Ex. 6. Zimmerman himself restarted the custody proceeding in March 2014 when he filed a motion seeking a final order. Ex. 10. Marina’s mother repeated the abuse allegations in petitions filed in April and June 2014, and the District Court entered an Agreed Order finding that those allegations were true on June 16, 2014. Exs. 11, 12, 13. Surely, the entry of a court order finding that a City Council candidate had “a history of mental and physical abuse” of his only daughter, entered during an election year, is a matter of public concern.

Moreover, Zimmerman invited public scrutiny by injecting his estranged daughter’s name into his campaign:

My wife Jennifer Winter Zimmerman holds B.S. and M.S. degrees in education and has worked over a decade as a high school Spanish teacher; she has also been working part time for Alaska Airlines. I have one remarkable teenage daughter, Marina Lorna Zimmerman.

Ex. 4. By introducing his *second* wife as Jennifer Zimmerman and then referring to his daughter as Marina Zimmerman – a name she no longer uses¹ – the campaign website created the misleading impression of a happy nuclear family of three. After making his daughter part of his political campaign, Zimmerman cannot claim that the public had no interest in learning about how he lost all right to see or even communicate with her.

¹ See <http://www.olympianfencing.com/results/> (announcing Marina Bochenkova’s 2012 and 2013 medals in fencing); http://www.usfencing.org/news_article/show/269458?referrer_id=669372-usa-fencing-news (announcing Marina Bochenkova’s third-place ranking in Division III Women’s Epee National Championship).

B. Zimmerman has not met his Chapter 27 burden.

1. Zimmerman misstates the legal standards.

First, Zimmerman’s characterization of his TCPA burden as “very low” is self-serving and incorrect. He must present “clear and specific evidence” on each element of his claim, without reliance on conclusory statements and unaided by inferences. *Fitzmaurice v. Jones*, 417 S.W.3d 627, 632 (Tex. App. – Houston [14th Dist.] 2013, no pet.).

Next, while admitting he has the burden of proving falsity, he ignores that he must prove *substantial* falsity. Even if an alleged defamatory statement contains minor inaccuracies, a plaintiff must prove that the publication was more damaging to his reputation than a truthful statement would have been. *McIlwain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990).

Finally, Zimmerman badly misstates the standard of fault in a libel case brought by a public official like himself. He must prove *actual* malice, not *common law* malice. “‘Actual malice’ in a defamation case is a term of art. Unlike common-law malice, it does not include ill-will, spite or evil motive.” *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 420 (Tex. 2000). The plaintiff must prove that “the defendant in fact entertained serious doubts as to the truth of his publication,” or had “a high degree of awareness of probable falsity of the published information.” *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 162 (Tex. 2004).

2. There is no evidence – let alone clear and specific evidence – that the article was false – let alone substantially false.

Zimmerman makes no effort to defend three of the four statements that his petition alleged were defamatory. *See* Ex. 1 at 2-4. He tries to defend only one of his claims, and fails utterly.

Without quoting a word from the article, Zimmerman claims the *Bulldog* reported “*that the doctor reports literally state*” that Zimmerman abused his daughter, and failed to “express that these are allegations” and “hearsay by the doctor.” Resp. at 5 (emphasis in original). This

characterization of the article is demonstrably false.

The *Bulldog* article describes the contents of Dr. Neitsch's reports in three sections labeled "Doctor's first examination," "Doctor's second examination," and "Doctor's third examination," making it absolutely clear that the medical records are reports of doctor's visits. Ex. 2 at 1. The article also clearly states that "[e]ach incident occurred during evening or weekend visits when Zimmerman had sole possession" of his daughter. *Id.* No reasonable reader could think that the reports were Dr. Neitsch's personal observations of abuse, rather than her examinations.

Moreover, contrary to Zimmerman's claim, the reports show that Dr. Neitsch did, in fact, "actually confirm abuse." Resp. at 5. Her assessment was, literally, "ABUSE." Ex. 7 at 5. She documented that assessment with the ICD-9 code used to record a diagnosis of abuse: E967.0.

Assessment:

Assessment:

1. Strain of unspecified site - 848.9 (Primary)
2. ABUSE BY FATHER/STEPFATHER/BF - E967.0
greater than 50% of 30 min exam visit was in counseling.

Ex. 7 at 5. Dr. Neitsch also documented her belief that Marina faced a life-threatening situation and her intention to contact CPS:

Plan:

1. Strain of unspecified site

concerns of abuse with hip and shoulder strain. Recommended if CPS does not intervene that this could lead to a life threatening situation. I recommend they pursue legal full custody as soon as possible. We will contact CPS about the situation. She will be with her mom this weekend so we will contact them monday.

Id. Finally, she documented her fear for Marina's life:

Preventive: Counseling: Domestic violence , warned this was the most common cause of homicide in Texas and in our area and needs to be taken seriously. the situation seems to be escalating quickly due to CPS investigation.

Id. Dr. Neitsch's decision to contact CPS confirms her personal belief that Maria had been abused. See Tex. Family Code §§ 261.101(a); 261.102 (requiring a physician to report within 48 hours a "belief that a child has been or may be abused or neglected"). So, even if the article *had* stated that

the medical reports “literally state” that Marina was abused, it would have been totally accurate.

Finally, Zimmerman cannot *possibly* prove that the article was substantially false because he admitted abusing his daughter and he admitted that denying him all custody was in her best interest.

The third petition to modify alleged, as did the two filed before it, that:

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

Ex. 12 at 2. The Agreed Order entered a week later stated:

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. IT IS ORDERED that the requested modification is GRANTED.

Ex. 13 at 2. Zimmerman signed and approved the Agreed Order:

APPROVED AND CONSENTED TO AS TO BOTH FORM AND SUBSTANCE:

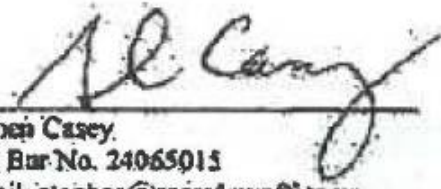

KATERYNA BOCHENKOVA, Petitioner


DONALD SHELLEY ZIMMERMAN, Respondent

Id. at 10. Zimmerman’s lawyer Stephen Casey, also representing him here, likewise signed and approved as to form:

APPROVED AS TO FORM ONLY:

Casey Law Office, P.C.
600 Round Rock West Drive, Suite 602
Round Rock, Texas 78681
Tel: (512) 257-1324
Fax: (512) 853-4028.

By: 
Stephen Casey
State Bar No. 24065015
E-Mail: stephen@caseylawoffice.us
Attorney for Respondent

Id. at 8-9. Zimmerman and his attorney act as if these documents do not exist, even though they prove this lawsuit lacks any basis in law or fact.

The Austin Bulldog article was far more sympathetic than a report limited to the judicial records would have been, because it reported Zimmerman's contemporaneous denials and accusations, even though Zimmerman filed nothing in the custody proceedings denying the abuse. *See* Ex. 6-14. Zimmerman has utterly failed to prove that the article is false, let alone substantially false, because no reading of the *Bulldog* article could convey a more damaging "gist" than that conveyed by the actual judicial records. *Id.*²

2. Discovery would be pointless and improperly burden political reporting.

Zimmerman filed no request for discovery until late Friday afternoon, January 2, 2015. He now says he needs discovery "to demonstrate malice," but he does not explain how the discovery he

² The Response claims that Zimmerman's lawyer "provided, free of charge to the website, a transcript of the child's counselor who testified that the daughter was manipulating the situation against Zimmerman," implying that it contained testimony proving that Marina's outcry of abuse was fabricated. Resp. at 1. But transcript (which Zimmerman does not provide the Court) was from a hearing *in August 2010*, six months *before* Marina went to Dr. Neitsch in February 2011 bearing bruises from her three visitations with Zimmerman. *See* Ex. 19. Moreover, Zimmerman's attorney did not send this meaningless transcript to the *Bulldog* until *after* he filed this lawsuit. *See* Ex. 1 (petition filed 9:21 a.m., October 15, 2014); Ex. 19 (email sent 3:40 p.m., October 15, 2014).

seeks could possibly prove the *applicable* standard – actual malice. Resp. at 6. Zimmerman has no hope of proving that the Defendants knew or suspected that the *Bulldog* article was substantially false because he cannot show that the article was, in fact, false. Seeking discovery is just another effort to use this lawsuit to disrupt and impose costs on a small, non-profit publication.

In fact, Zimmerman’s belated discovery request shows that he and his lawyer/campaign treasurer never intended to pursue this lawsuit past election day. Look at the calendar: the *Bulldog* filed its motion to dismiss on November 25, and the hearing was set for December 18, two days after the run-off election. Although he *now* says he needs discovery, Zimmerman made no effort to seek discovery in the three weeks before the election, even though the TCPA requires a motion and showing of good cause to lift the discovery stay. See Tex. Civ. Prac. & Rem. Code § 27.006(b). Zimmerman took no steps to defend the motion to dismiss. Clearly, the plan all along was to nonsuit after the election. As Zimmerman now admits, he thought he could leave this lawsuit pending during the campaign and then nonsuit right before the hearing, without any negative repercussions to him. Resp. at 2.³ Fortunately, the Legislature enacted the TCPA *precisely* to impose consequences on parties who abuse the court system in this way.

³ Although it hardly justifies his attempt to manipulate the judicial process, Zimmerman claims that “the case law in existence [limiting the right to nonsuit] turned on *independent statutory counterclaims* and *independent motions for sanctions*,” not motions to dismiss. Resp. at 2 (emphasis in original). This is simply wrong. The Supreme Court’s most recent precedent limiting a plaintiff’s unilateral right to nonsuit arose under statutes that, like the TCPA, provide for the award of attorney’s fees if a defendant’s motion to dismiss is granted. *CTL/Thompson Texas LLC v. Starwood Homeowner’s Ass’n*, 390 S.W.3d 299 (Tex. 2013); *Crites v. Collins*, 284 S.W.3d 839 (Tex. 2009); *Villafani v. Trejo*, 251 S.W.3d 466 (Tex. 2008). Moreover, by the time Zimmerman filed his nonsuit, two courts of appeals had ruled that a nonsuit does *not* divest the district court of jurisdiction to award fees and sanctions under the TCPA. *James v. Calkins*, 446 S.W.3d 135 (Tex. App. – Houston [1st Dist.] 2014, n.p.h.); *Rauhauser v. McGibney*, – S.W.3d –, 2014 WL 6996819 (Tex. App. – Fort Worth, Dec. 11, 2014, n.p.h.).

C. *The Bulldog* has proven an affirmative defense by a preponderance of evidence.

Zimmerman completely fails to respond to the *Bulldog*'s proof that its article falls within the judicial proceeding privilege, Section 73.002(b)(1)(A), Tex. Civ. Prac. & Rem. Code. *See* Resp. at 1-9. On that basis alone, the Defendants' motion may be granted.

At the December 18 hearing, counsel appeared to suggest that the privilege is unavailable under Section 73.002(a), the second sentence of which says "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 a matter of public concern*." Tex. Civ. Prac. & Rem. Code § 73.002(a) (emphasis added). This argument, even if it had been made, fails for three reasons.

First, the October 9, 2014, *Bulldog* article was its *first* publication – it was not a republication. Second, Zimmerman cannot prove that the Defendants published the article with actual malice because he cannot prove the article was substantially false. Third, Zimmerman made the subject matter of the article "of public concern" by injecting his estranged daughter into his political campaign.

D. **The Court determines what fees are reasonable, but it *must* award fees, costs, expenses and sanctions if the *Bulldog* prevails.**

Undersigned counsel spent the time he considered necessary to present the Court with a carefully drafted, factually and legally supported motion to dismiss. Counsel for the Plaintiff (somewhat oddly) argues that it should have taken less time to prepare a motion to dismiss the very lawsuit that he filed. This Court will make its own decision as to reasonableness of fees. The Defendants would simply note the following points.

First, Zimmerman's gamesmanship in not immediately serving the Defendants with citation is irrelevant. *The Austin Bulldog* and Ken Martin have the right to vigorously contest meritless accusations of libel. They did not have to wait on Zimmerman's timetable before filing a Chapter

27 motion seeking a dismissal with prejudice. *James v. Calkins*, 446 S.W.3d 135, 142 (Tex. App. – Houston [1st Dist.] 2014, n.p.h.); *Rauhauser v. McGibney*, – S.W.3d –, 2014 WL 6996819, at *3 (Tex. App. – Fort Worth, Dec. 11, 2014, n.p.h.).

Second, although the Court decides what is reasonable, it *must* award fees if the *Bulldog* prevails. Tex. Civ. Prac. & Rem. Code § 27.009(a)(1). The Defendants’ fees fall well within the range of awards made under the TCPA. *See* Ex. 20 (collecting cases).

Finally, the TCPA also requires an award of “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.” Tex. Civ. Prac. & Rem. Code § 27.009(a)(2). Zimmerman, as an elected public official, is sure to be subject to future news reporting, some of which he will consider negative. The Defendants’ suggest that hypersensitivity to critical reporting and a history of baseless attacks on a small, non-profit publications⁴ are relevant in deciding what sanction would be sufficient to deter similar lawsuits in the future.

II. Conclusion.

For these reasons, and those set out in the Defendants’ Motion to Dismiss, this Court should dismiss the Plaintiff’s claims with prejudice, award the Defendants court costs, reasonable attorney’s fees and other expenses incurred in defending this lawsuit, additional sanctions sufficient to deter the Plaintiff from bringing similar actions in the future, and such other relief to which the Defendants may be justly entitled.

⁴ The *Bulldog* was not the only target of Zimmerman’s litigious threats. He also threatened to sue *The Austin Monitor* for reporting on his child custody case. Ex. 21. The *Monitor* chose to pull down its story, even though it was accurate, rather than face the expense of a lawsuit. *Id.*

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
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(512) 480-5764
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By: /s/ Peter D. Kennedy
Peter D. Kennedy
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**ATTORNEYS FOR DEFENDANTS
AUSTIN INVESTIGATIVE PROJECT,
d/b/a THE AUSTIN BULLDOG and
KEN MARTIN**

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2015, a true and correct copy of the foregoing was served
via electronic filing service and as shown below:

Stephen Casey
CASEY LAW OFFICE, P.C.
595 Round Rock West Drive, Suite 102
Round Rock, Texas 78681
(*via* email: stephen.casey.law@gmail.com)

David Andrew Rogers
Law Office of David Rogers
1201 Spyglass, Suite #100
Austin, Texas 78746
(*via* Hand Delivery at hearing)

/s/ Peter D. Kennedy
Peter D. Kennedy

EXHIBITS

19. Stephen Casey email to Bill Aleshire with August 3, 2010 transcript.
20. Excerpt from Media Law Resource Center Newsletter, October 2014.
21. *The Austin Monitor* article, October 15, 2014.

Kennedy, Pete

From: Bill Aleshire <aleshire@r-alaw.com>
Sent: Wednesday, October 15, 2014 6:14 PM
To: Kennedy, Pete
Cc: Martin, Ken
Subject: FW: copy of transcript
Attachments: Transcript_Redacted.pdf; Untitled attachment 00040.txt

-----Original Message-----

From: Stephen Casey [<mailto:stephen.casey.law@gmail.com>]
Sent: Wednesday, October 15, 2014 3:40 PM
To: Bill Aleshire
Subject: copy of transcript

Here it is. Marina's name and some private information not bearing on the issue was redacted.

Stephen

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. D-1-FM-05-000710

IN THE INTEREST OF

██████████ ZIMMERMAN,

A CHILD

) IN THE DISTRICT COURT
)
) TRAVIS COUNTY, TEXAS
)
) 201ST JUDICIAL DISTRICT

HEARING EXCERPT

(TESTIMONY OF DR. CARYL DALTON)

On the 3rd day of August, 2010 the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable Gus Strauss,
Judge presiding, held in Austin, Travis County, Texas;
Proceedings reported by machine shorthand.

 **COPY**

KTRK Awarded Over \$250,000 in Fees and Mandatory Sanctions Under Anti-SLAPP Law

By Laura Lee Prather and Alicia Calzada

In what is the second largest attorneys' fees award in the Texas anti-SLAPP statute's three-year history, a judge in Harris County, Texas awarded KTRK Television over \$250,000 in attorney's fees on remand after the station won an anti-SLAPP appeal. [*Robinson v. The Walt Disney Comp. at al.*](#), No. 2011-54895 (Oct. 8, 2014).

Background

In October 2010, Houston television station KTRK accurately reported on the closing of a charter school due to, among other things, a lack of adequate funds, allegations of financial mismanagement and failure to properly account for state funds. Theola Robinson, the school's former superintendent, sued the station and its indirect parent corporations, including Disney alleging defamation. Robinson originally tried to sue just Disney in federal court (on two different occasions) – to no avail. Ultimately, almost a year after the broadcast at issue, Robinson sued both KTRK and Disney in state court.

While Robinson was forum shopping, trying to reach the ultimate parent company, the Texas Legislature was busy enacting the Texas Citizens Participation Act – an anti-SLAPP statute prohibiting meritless lawsuits, like this one, filed out of retaliation for the exercise of First Amendment rights. The anti-SLAPP statute went into effect in June, 2011, and Robinson's claims ultimately landed in state court when she filed her third lawsuit against Disney (and first against KTRK) in October, 2011.

Anti-SLAPP Motion

Shortly thereafter, KTRK filed a motion to dismiss under the Texas Citizens Participation Act which, at the time, was a new and untested statute. The trial court denied the motion, and KTRK filed an interlocutory appeal of the denial which is permitted and handled on an expedited basis under the statute. The First Court of Appeals of Texas reversed the trial

court's denial of the anti-SLAPP motion, holding the broadcasts had not accused Robinson of the commission of a crime and, thus, there was no basis for her libel per se claim. Robinson's claim was dismissed, and the case was remanded for a determination of fees and sanctions. Before the trial court could make its monetary award, Robinson filed more than half a dozen appellate challenges.

In classic SLAPP-suit fashion, the cost of resolving the litigation was driven up significantly by these persistent meritless efforts to challenge the appellate court's ruling on the law. By the time Robinson's voluminous challenges were over and the trial court heard the motion for fees on remand, the cost of defending the litigation mounted to \$258,708.32 in attorneys' fees, expenses, and court costs.

The trial court awarded the amount in its entirety. Furthermore, Plaintiff's tireless efforts to reach Disney's deep pocket were stymied when the Court granted its Special Appearance and held there was no jurisdiction over Disney.

Under the TCPA, when a court dismisses a legal action under the statute, it shall award to the moving party "court costs, reasonable attorney's fees" and "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." To date, KTRK's award is the second largest attorney's fees award under Texas' anti-SLAPP law.

In August, another Harris County court awarded \$350,000, in attorneys' fees and \$250,000 in sanctions, when granting an anti-SLAPP motion in *Schlumberger Limited and Schlumberger Technology Corporation v. Charlotte Rutherford*, No. 2014-13621 (127th District Court, Harris County, TX, August 27, 2014). The Schlumberger opinion has been appealed.

Other large anti-SLAPP attorneys' fees awards have included an award of \$250,001.44 in *John Moore Services, Inc. & John Moore Renovation, LLC v. The Better Business Bureau of Metropolitan Houston, Inc.*, No. 2012-35162 (269th Dist. Ct., Harris Cty, Tex., August 8, 2014) (awarded

(Continued on page 23)

(Continued from page 22)

on remand after an appeal); and *Kristina Head v. Chicory Media, LLC d/b/a/ Starcasm.net*; *American Media, Inc., d/b/a/ Star Magazine*; *Perez Hilton Management, Inc. d/b/a perezitos.com*, 415 S.W. 3d 559 (Tex. App. - Texarkana, 2013, no pet.) No. 2013-0040 (71st Dist. Ct., Harrison County, Tex. Sept 25, 2013) (\$187,309 total attorney's fees awarded to defendants AMI, Chicory, & Perez Hilton Management, Inc. and \$55,000 combined in sanctions to defendants). An appeal of the *Head* case was dismissed for want of prosecution.

In addition to fees, the Texas anti-SLAPP statute requires imposition of sanctions – with the amount being discretionary. Whether sanctions were mandatory has been the topic of some fodder by Texas trial courts; however, in the recent case of *Sullivan v. Abraham*, Texas' Seventh Court of Appeals in Amarillo held that "[t]hrough use of the word

'shall,' the legislature evinced its intent to impose upon the trial court an obligation to assess sanctions." *Sullivan v. Abraham*, 07-13-00296-CV, 2014 WL 5140289 (Tex. App.—Amarillo Oct. 13, 2014, no. pet. h.). In holding that sanctions, as well as attorney's fees, were mandatory, the *Sullivan* court reversed a trial court's failure to award sanctions on remand in an anti-SLAPP case.

While, at first blush, these recent substantial awards may seem extraordinary; however, they demonstrate both the oppressive cost of SLAPP suits on defendants and the effectiveness of the statute in shifting the burden of these costs to plaintiffs who file meritless claims which create a chilling effect on the exercise of defendants' First Amendment rights.

Laura Lee Prather, a partner, and Alicia Calzada an associate, at Haynes and Boone, Austin, TX, represented KTRK.

Recent MLRC Publications

MLRC Model Shield Law

The MLRC Model Shield Law was developed by the MLRC Model Shield Law Task Force. It will update a prior Model that we developed a number of years ago. The Model Shield Law has been designed to assist in the creation, or updating, of state shield laws.

MLRC Bulletin 2014 Issue 2: Legal Frontiers in Digital Media

All Native Advertising is Not Equal — Why that Matters Under the First Amendment and Why it Should Matter to the FTC • The Google Books and HathiTrust Decisions: Massive Digitization, Major Public Service, Modest Access • The Authors Guild v. Google: The Future of Fair Use? • The Computer Fraud and Abuse Act – Underused? Overused? Misused?

Key Points on DOJ Policy

MLRC memo representing some of the key points from the Final Rule publication.

2014 Report on Trials and Damages

MLRC's 2014 Report on Trials and Damages updates our study to include 12 new cases from 2012 and 2013. Our trial database now includes trial and appellate results in 632 cases from 1980-2013.

Resource Materials on the Definition of "Journalist" and "Media" in Litigation and Legislation: 2014 Update

Who qualifies as "the media," it seems, is the perennial million-dollar question in an age when the "pen," the camera, and the "press" are all combined in a single device that fits easily in your purse—if not your back pocket—and everyone is a potential publisher. This updated report offers a review of that question by examining legislative developments and court decisions in a variety of situations, ranging from libel and right of publicity issues, to state shield laws and reporter's privilege changes, to application of state and federal open records laws.



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Monitor/705048206171979)



Wednesday, October 15, 2014 by Jo Clifton (<http://www.austinmonitor.com/stories/author/jo-clifton/>)

🔗 POLITICS ([HTTP://WWW.AUSTINMONITOR.COM/STORIES/CATEGORY/POLITICS/](http://www.austinmonitor.com/stories/category/politics/))

Zimmerman threatens lawsuit over abuse stories

An attorney representing District 6 candidate Don Zimmerman has threatened to sue The Austin Bulldog over last week's story referring to alleged physical abuse of his daughter and subsequent court action giving Zimmerman's ex-wife sole managing conservatorship of the child.

Zimmerman's attorney, Stephen Casey, also demanded that the Austin Monitor retract a Whisper concerning the Bulldog story in last Friday's publication within 24 hours. Even though the Monitor does not believe the item was defamatory, the item was removed from the site Friday evening.

However, the statement that Zimmerman had "lost his parental rights" was imprecise. He remains the child's possessory conservator. That means that he has the right to receive information and consult with professionals about his daughter's health, education and welfare; the right to access medical records, dental records and school records; the right to consent to medical treatment; and the right to manage the estate of the child "to the extent the estate has been created by the parent or the parent's family." All of those rights are set forth in court records dated June 16, 2014.

The Bulldog has not apparently removed or changed its story since receiving Casey's letter. According to the agreed temporary injunction filed in Travis County District Court Feb. 16, 2011, Zimmerman was prohibited from visiting, having possession of, contacting or communicating with the child, MZ (name redacted for this story). Zimmerman and the child's mother were divorced in 2005.

Zimmerman reportedly told the Bulldog that all the information cited in court documents from 2011 were "unequivocal lies. They are outright fabrications and absolute lies." That story also contains links to notes from MZ's doctor, Deborah Neitsch, MD, who urged the girl's mother, Kateryna Bochenkova, to seek the restraining order and contacted Child Protective Services, as required by state law when there is a suspicion of abuse.

Court documents cited in both stories show that Zimmerman relinquished his custodial rights to the child on June 16, 2014.

Bulldog editor Ken Martin declined comment for this story and referred a reporter to his lawyer, Bill Aleshire.

Aleshire said, "At this time, I don't have any reason to believe that The Bulldog reported anything except what's in the records." He explained that journalists are not subject to defamation suits when reporting on a judicial proceeding based on court records. "There is a privilege to be able to do that," he said, noting that the threatened legal action "has the smell of a SLAPP suit."

SLAPP stands for a strategic lawsuit against public participation. It is generally regarded as a suit intended to censor or intimidate members of the media and other critics by forcing them to concentrate on defending themselves against a lawsuit. The point of the SLAPP is that such a burden will cause the defendant to stop saying or publishing the critical information. The SLAPP suit also may cause other critics to give up the idea of pursuing the same story or line of criticism.

The State of Texas has a strong anti-SLAPP statute that allows the defendant in such a suit to seek dismissal of the case within 60 days of its filing.

Zimmerman is in a six-way race to represent District 6. Political observers believe this race will be decided in a runoff on Dec. 16, like many of the other City Council races.

◀ Return to Today's Headlines (/)

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KEY PLAYERS & TOPICS IN THIS ARTICLE

Austin City Council November 2014 Elections (<http://www.austinmonitor.com/stories/tag/austin-city-council-november-2014-elections/>): The November 2014 Austin City Council elections mark a shift from an all-at-large City Council to one elected based mostly on geographic districts. The city's Mayor will remain elected at-large.

The Austin Bulldog (<http://www.austinmonitor.com/stories/tag/the-austin-bulldog/>)

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2014: An Austin Monitor review (<http://www.austinmonitor.com/stories/2014/12/2014-austin-monitor-review/>)

This past year was a dynamic one in Austin, and though the future promises to be just as interesting, at the close of 2014 we invite you to take a trip back over the past 12 months. Though a lot...

READ FULL STORY ([HTTP://WWW.AUSTINMONITOR.COM/STORIES/2014/12/2014-AUSTIN-MONITOR-REVIEW/](http://www.austinmonitor.com/stories/2014/12/2014-austin-monitor-review/))

Austin Monitor Radio: Election Result Analysis

(<http://www.austinmonitor.com/stories/2014/12/austin-monitor-radio-election-result-analysis/>)

Jo Clifton and Mike Kanin analyze the final results of the 2014 Austin City Council elections. The show is posted here, below:

READ FULL STORY ([HTTP://WWW.AUSTINMONITOR.COM/STORIES/2014/12/AUSTIN-MONITOR-RADIO-ELECTION-RESULT-ANALYSIS/](http://www.austinmonitor.com/stories/2014/12/austin-monitor-radio-election-result-analysis/))

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