

No. D-1-GN-14-004290

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 <sup>RD</sup> JUDICIAL DISTRICT

**DEFENDANTS' MOTION TO DISMISS PURSUANT TO  
CHAPTER 27, TEX. CIV. PRAC. & REM. CODE**

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants Austin Investigative Reporting Project, d/b/a *The Austin Bulldog* (“*The Austin Bulldog*”) and Ken Martin (collectively, “Defendants”) move to dismiss the Plaintiff’s Original Petition pursuant to Chapter 27, Tex. Civ. Prac. & Rem. Code, and would respectfully show:

**I. Introduction and Summary.**

This frivolous lawsuit was filed to intimidate an investigative reporter – exactly the type of abuse that the Texas Legislature sought to prevent and remedy when it enacted the Texas Citizens Participation Act (“TCPA”). Pursuant to that law, this case must be promptly dismissed.

Don Zimmerman, candidate for Austin City Council, touts in his campaign materials that he has “one remarkable teenage daughter, Marina Lorna Zimmerman.” What he does not say is that when this daughter accused him of repeated acts of mental and physical abuse, he agreed to relinquish custody without a fight. In fact, a final court order entered this year at Zimmerman’s own request requires that he have “no possession or access” whatsoever to his only child.

When *The Austin Bulldog*, a small independent non-profit online newspaper, discovered and reported these facts, Zimmerman had his lawyer/campaign treasurer threaten and then file this

lawsuit. Zimmerman's lawsuit is a transparent effort to bully the media into not reporting negative information about him prior to the December run-off election.

Under the TCPA, a plaintiff must present "clear and specific evidence" of each element of his case before proceeding with a lawsuit that attacks a defendant's exercise of the right to free speech. Zimmerman cannot meet this burden, because *The Austin Bulldog* article is a meticulously fair and accurate report of the judicial proceedings that resulted in him losing access to his daughter.

This lawsuit quibbles about the article's wording, but utterly fails on each point.

First, the article's report that Zimmerman "lost custody over abuse" is literally and substantially true. Zimmerman "lost custody" under both the common and technical legal meanings of the word. The direct cause of him losing custody was his daughter's outcry of abuse, which was corroborated by her step-father's testimony and her doctor's records. In fact, the court records reflect that Zimmerman agreed, and the Court found, that he had a history of mental and physical abuse of his daughter, and that it was in her best interest that she have no contact with him at all.

Second, the article accurately reported that court records document Zimmerman's abuse. Three petitions, an affidavit, and detailed medical records all describe the abuse. Zimmerman filed nothing in the proceedings denying the abuse. In fact, Zimmerman twice agreed to the entry of court orders that denied him any possession or access to his daughter, and he twice agreed that this was in his daughter's best interest.

Third, the article accurately reported that Zimmerman suffered a "permanent loss of parental rights." While Zimmerman retains the title "possessory conservator," a final order that Zimmerman himself asked to be entered denies him any right to possession of or access to his daughter. *The Austin Bulldog* did not report that Zimmerman lost *all* parental rights, as he claims, but it is undisputed that he lost the rights that matter – custody and access to his child.

Finally, *The Austin Bulldog* accurately described the allegations of abuse and accurately attributed them to the step-father's affidavit and the doctor's records. The article did not report that the doctor was an eyewitness to the abuse, as Zimmerman claims, but the doctor's records are clear that she feared for Marina's safety: she concluded that Marina had suffered child abuse; she reported the abuse to CPS; she believed Marina was in a life-threatening situation; and she recommended that her mother immediately seek full custody, for fear that the domestic violence Marina was suffering could lead to homicide.

Zimmerman cannot prove his case. This lawsuit should be promptly dismissed.

## **II. Chapter 27 Provides for Prompt Dismissal of Meritless Libel Lawsuits Attacking the Exercise of the Right to Free Speech.**

The Legislature recently enacted the Texas Citizens Participation Act ("TCPA"), which protects the constitutional rights of speech, assembly and petition from baseless lawsuits. Tex. Civ. Prac. & Rem. Code §§ 27.001, *et seq.* The TCPA seeks 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." *Id.* § 27.002.

Under Chapter 27, a party may, within 60 days of service, file a motion to dismiss any lawsuit that "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 assembly . . . ." Tex. Civ. Prac. & Rem. Code § 27.003. Upon filing, "all discovery . . . is suspended until the court has ruled on the motion," unless the court, upon motion and a showing of good cause, allows "specified and limited discovery relevant to the motion." *Id.* § 27.003(c); § 27.006(b). The motion must be heard within 60 days, except under narrow circumstances. *Id.* § 27.004(a).

The movant's burden is minimal: to show "by a preponderance of the evidence that the

legal action is based on, relates to, or is in response to the party's exercise of (1) the right to free speech; (2) the right to petition; or (3) the right of association." Tex. Civ. Prac. & Rem. Code § 27.005(b). The burden then shifts to the plaintiff to prove "by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). If the plaintiff fails to meet this burden, the claim must be dismissed. *Id.* § 27.005(b). Even then, the court must still dismiss "if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." *Id.* § 27.005(d).

If the motion is granted, the court "shall award" "(1) court costs, reasonable attorney's fees and other expenses incurred as justice and equity require; and (2) sanctions ... as the court determines sufficient to deter the party who brought the action from bringing similar actions." Tex. Civ. Prac. & Rem. Code § 27.009(a).

### **III. Grounds for Dismissal.**

#### **A. This lawsuit is based on the Defendants' exercise of their right of free speech and their right to petition.**

The TCPA defines the "exercise of the right to free speech" as "a communication made in connection with a matter of public concern." Tex. Civ. Prac. & Rem. Code § 27.001(3). A "matter of public concern" includes any issue related to "health or safety," "the government," or "a public official or public figure." *Id.* § 27.001(7)(A), (C), (D). The "exercise of the right to petition" includes "a communication in or pertaining to a judicial proceeding." *Id.* § 27.001(4)(A)(i). This lawsuit easily meets these criteria.

Plaintiff Don Zimmerman is a candidate for Austin City Council. Ex. 4; Ex. 18 ¶ 3. He has sued these Defendants for publishing an article about him. Ex. 1. A candidate for public office is a public figure. *E.g., Ross v. Labatt*, 894 S.W.2d 393, 395 (Tex. App. – San Antonio 1994, writ dismissed w.o.j.) (candidate for city council is a public figure); *Pitts & Collard, L.L.P. v. Schechter*,

369 S.W.3d 301, 326 (Tex. App. – Houston [1<sup>st</sup> Dist. 2011], no pet.) (nominee for METRO board is a public figure). Any matter related to a candidate’s fitness for public office is a matter of public concern. *E.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (“a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office”); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (“a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office”). Zimmerman implicitly admits that the child abuse accusations against him are relevant to his candidacy by claiming that *The Austin Bulldog* article hurt his reputation. Ex. 1 ¶¶ 23. Moreover, Zimmerman put his family relationships at issue by claiming on his campaign website that “I have one remarkable teenage daughter, Marina Lorna Zimmerman,” Ex. 4, without disclosing the true status of his relationship with her.

Therefore, publishing *The Austin Bulldog* article was clearly an exercise of the Defendants’ right of free speech. In addition, because the article is “a communication ... pertaining to a judicial proceeding,” its publication was also an exercise of the Defendants’ right to petition, as defined in the TCPA. Tex. Civ. Prac. & Rem. Code § 27.001(4)(A)(i).

The Defendants have met their burden under the TCPA. The burden now shifts to the Plaintiff to prove, by clear and specific evidence, a prima facie case for each essential element of his claim. Tex. Civ. Prac. & Rem. Code § 27.005(c).

To establish a claim of libel, a public official or public figure plaintiff must prove, by clear and convincing evidence, that the defendant published a substantially false and defamatory statement about the plaintiff with actual malice. *Neely v. Wilson*, 418 S.W.3d 52, 61 (Tex. 2013); *Casso v. Brand*, 776 S.W.2d 554, 555 (Tex. 1989). The Plaintiff cannot meet his burden because, among other reasons, he cannot prove that the article is substantially false. Even if Zimmerman

could meet his Chapter 27 burden, it would be unavailing because, as shown below, a preponderance of the evidence establishes an affirmative defense: the article is privileged from suit because it is a substantially true report of a judicial proceeding.

**B. The *Austin Bulldog* article is privileged from suit because it is a substantially true account of a judicial proceeding.**

A “trial is a public event. What transpires in the court room is public property.” *Craig v. Harney*, 331 U.S. 367, 374 (1947). The First Amendment and the common law provide a complete privilege from libel suits for accurate reports of judicial proceedings. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975); *Neely v. Wilson*, 418 S.W.3d 52, 68 (Tex. 2013); Restatement of Torts (Second) § 611. In addition, the privilege is codified in Section 73.002(b)(1) of the Texas Civil Practice & Remedies Code, which provides that a publication’s fair, true and unbiased account of a judicial proceeding is privileged.

The judicial proceeding privilege “assesses whether the reporter’s account of the proceedings (not the underlying allegations made in those proceedings) was fair, true, and impartial.” *Neely*, 418 S.W.3d at 68 (citing *Denton Publ’g Co. v. Boyd*, 460 S.W.2d 881, 883 (Tex. 1971)). A report is “fair, true, and impartial” if it conveys a substantially true account of the judicial proceeding. *Texas Monthly, Inc. v. Transamerican Natural Gas Corp.*, 7 S.W.3d 801, 805 (Tex. App. – Houston [1st Dist.] 1999, no pet.); *Crites v. Mullins*, 697 S.W.2d 715, 717 (Tex. App. – Corpus Christi 1985, writ ref’d n.r.e.).

A statement is substantially false only if it is “more damaging to [the plaintiff’s] reputation, in the mind of the average listener, than a truthful statement would have been.” *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990). If the “gist” of the statement is true, “any variance with respect to items of secondary importance” are disregarded. *Id.* The substantial truth doctrine requires “considerable latitude.” *Texas Monthly, Inc.*, 7 S.W.3d at 805 (citing *Hill v.*

*Herald-Post Publishing Co.*, 891 S.W.2d 639 (Tex. 1994)). “Although it may greatly exaggerate the libel-plaintiff’s misconduct alleged in a judicial proceeding, an article is substantially true if an ordinary reader would not attach any more opprobrium to the plaintiff’s conduct merely because of the exaggeration.” *Id.* “Even when the scale of the misconduct has been exaggerated manyfold,” the statements are not actionable “if no more opprobrium would be attached to appellant’s actions merely because of such exaggeration.” *Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512, 515 (Tex. App. – Tyler 1987, writ dismissed w.o.j.) (quoting *Crites*, 697 S.W.2d at 717).<sup>1</sup>

Zimmerman quibbles with language in *The Austin Bulldog* article, but he cannot show that it is false, let alone substantially false. In fact, the article is a scrupulously fair and accurate report of a judicial proceeding, and therefore privileged.

**1. What the court records show happened in Zimmerman’s divorce and custody proceedings.**

The divorce decree. Don Zimmerman and Kateryna Zimmerman (now Bochenkova) were divorced in 2005. Ex. 5. The decree appointed them joint managing conservators of their one child, Marina. *Id.* at 2. Bochenkova was awarded primary possession, with Zimmerman having possession on Thursdays, every other weekend, every other Spring Break, and for an extended period each summer. *Id.* at 4-6.

The mother’s petition to modify. Five years later, Bochenkova filed a Petition to Modify Parent-Child Relationship. Ex. 6. Her petition alleged that circumstances had “materially and substantially changed.” *Id.* at 2. The petition alleged that “Respondent [Don Zimmerman] has a history or pattern of physical and emotional abuse directed against Marina Zimmerman.” *Id.* The

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<sup>1</sup> For example, a news report inaccurately reporting that an insurance swindle involved \$6.5 million, rather than \$875,000, was substantially true. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 123 (Tex. 2000). Similarly, a report that the plaintiff was charged with stealing \$168,000 was substantially true, although the actual amount charged was less than \$7,000. *Dudley v. Farmers Branch Daily Times*, 550 S.W.2d 99, 100 (Tex. Civ. App. – Eastland 1977, writ refused n.r.e.).

petition asked the Court to “deny Respondent access to the child.” *Id.* The petition was supported by authenticated medical records from Dr. Deborah Neitsch and the affidavit of Eric Fox, Marina’s step-father. Exs. 7 & 8.

The medical records. Dr. Neitsch’s medical records document three office visits by Marina, then 12 years old, in January and February, 2011. Ex. 7. The record from the first visit, January 24, 2011, reflect that Marina was “brought in after getting a bruise on her arm. There are concerns that her father is being physically and emotionally abusive to her when she is visiting him. ... He has been physically forceful with her in the past but CPS won’t investigate the case until there is signs [sic] of force. ... Her dad at this visit with him was yelling at her that she had demons that needed to be expelled per Marina.” *Id.* at 2. The medical examination revealed “diffuse spasms in the left trapezius that was tender upon palpation,” and a “2cm round bruise on ulnar aspect of distal forearm.” *Id.* Dr. Neitsch noted that “[w]e will contact CPS caseworker that is in charge of her case. No serious injury seems to have occurred but I worry about the psychological toll on her.” *Id.*

The second doctor visit occurred Friday, January 28, 2011, after Zimmerman’s Thursday night possession. Ex. 7 at 4. The medical records state that Marina had suffered “another bruise.” *Id.* Marina reported that Zimmerman “grabbed her shoulder and spun her around and pushed her backwards. ... He pushed her from be[h]ind as well and now she has a bruise on the left scapula.” *Id.* Dr. Neitsch noted “continued concern of her dad becoming physically forceful with her. ... [W]ill keep document for CPS case worker.” *Id.*

Two weeks later, Marina was back at the doctor’s office after another visitation with her father. Ex. 7 at 5. Dr. Neitsch noted that Marina’s “dad was harsh with her yesterday and pushed her against the microwave and now she has right hip pain and right shoulder pain.” *Id.* Although there was no bruising this time, “[h]er dad has been yelling at her and threatened to hit her but



didn't. He has threatened to kill her and she has fears of [him] shooting her.” *Id.* The medical examination revealed “tender spasms in the traps, painful ROM, right-sided,” “pain to medial rotate,” and “difficulty bearing weight on the right hip.” *Id.* Dr. Neitsch’s assessment was “ABUSE.” *Id.* The medical records reflect the doctor’s

concerns of abuse with hip and shoulder strain. Recommended if CPS does not intervene this could lead to a life threatening situation. I recommend they pursue [sic] legal custody as soon as possible. We will contact CPS about the situation.

*Id.* Dr. Neitsch recommended counseling for “domestic violence” and “warned this was the most common cause of homicide in Texas and in our area and needs to be taken seriously. [T]he situation seems to be escalating quickly due to CPS investigation.” *Id.*

The Fox affidavit. The petition was also supported by the affidavit of Eric Fox, Marina’s step-father, describing the incident that led to the third doctor visit. Ex. 8. Fox testified that his wife received a phone call from Marina which he overheard when the call was put on speaker. *Id.* at 1. Fox heard Zimmerman shout at Marina, among other things, “You need to go [to your room] now or you’re going to get hit! Go, go, you brat!” *Id.* Fox heard scuffling noises and the phone went dead. *Id.* Fox then received an email from Marina saying that Zimmerman took her phone away “by force,” “pushed me around, told me to shut up, pulled my hair and called me a brat.” *Id.* at 2.

Fox testified that when Marina got home, he “saw that she had a red mark on her forehead,” and she said “she was sore in several spots on her chest and back because her father had ‘smashed me into a wall and the microwave,’” had “wrenched” the phone from her hands, and had “grabbed her by the front of her coat, shook her while screaming, slammed her into a wall and the couch.” Ex. 8 at 2. Fox testified that Marina told him Zimmerman “ripped her hat off pulling her hair and threw it at her,” and that “he then threatened to hit her by raising his fist.” *Id.* Fox testified that Marina told him Zimmerman “cornered me in the car and started screaming,” called her “arrogant

stupid crazy and useless,” and that “she felt like ‘he was going to break my arm or something’ because ‘his face changed and he was like a different person.’” *Id.* Fox testified that Marina “developed a serious limp within an hour and had problems putting weight on her right leg.” *Id.*

Fox took Marina to the doctor’s office, where Fox heard her tell Dr. Neitsch “that she felt threatened and ‘he said he would kill me.’” Ex. 8 at 3. Fox’s affidavit continued:

I heard the Doctor ask again if “you[r] father said that? He said “he’d kill you?” I heard Marina say “yes” and I saw that she was trembling. I saw and heard Doctor Neitsch recommending to my wife immediate legal action and I heard her say that “CPS might not act quickly enough,” that she believed this was significant abuse and that “this is how people get killed. Take care of this now.” I heard her ask Marina if she wanted to go back. Marina told her “no, not ever.” I heard her ask Marina if she wanted to “ever see your Dad again” and I heard Marina respond “like once a month but with my Mom watching so he doesn’t hit me.”

I saw and heard Doctor Neitsch remind my wife that this “is the third visit and it’s getting worse fast.” I heard her tell me and my wife, “take care of this now because CPS will not intervene in time and he is dangerous.” I also heard her say “I will call CPS.” I saw and heard her go over the previous visits where Marina had bruises on her arms, shins and shoulders. I heard her say “the whole demonic possession thing is really scary” and I saw she looked very concerned.

*Id.* at 4.

Zimmerman filed no answer to the petition to modify, no general denial, and no opposition to the request for an injunction. *See* Ex. 14. Nothing in the court file reflects that Zimmerman denied any of these allegations of abuse. *Id.*

Agreed Temporary Injunction. Five days after the petition was filed, the Court entered an agreed temporary injunction, effective immediately, “denying Zimmerman any right to possess, contact or communicate with Marina.” Ex. 9. The order enjoined Zimmerman from:

Contacting, or communicating with, the child the subject of this suit in person, by telephone or in writing.

Taking possession of the child.

Disturbing the peace of the child or of another party.

Making disparaging remarks regarding Petitioner or Petitioner's family in the presence or within the hearing of the child.

*Id.* at 1. Although Zimmerman's lawyer neglected to sign the agreed order, her initials appear next to each hand-written delineation, including next to the Court's finding that "the parties have agreed to a temporary injunction." Ex. 9 at 1-2.

Zimmerman's motion for a final order. The agreed temporary injunction denying Zimmerman any contact or communication with his daughter remained in effect for over three years. During that period, the docket sheet reflects no effort by Zimmerman to regain custody or the right to communicate with his daughter. *See* Ex. 14. Finally, on March 10, 2014, Zimmerman filed a one-page Motion to Enter Final Order. Ex. 10. Zimmerman admitted that his relationship with Marina had "become fairly non-existent," and that "there has been no contact for a significant period of time." *Id.* Zimmerman sought no custody or access to his daughter, but simply that a final order be entered and the injunction lifted. *Id.*

Bochenkova's amended petitions. Bochenkova then filed an amended petition to modify, restating the allegation that Zimmerman "has a history or pattern of physical and emotional abuse" of Marina and again requesting that the Court deny Zimmerman all access to her. Ex. 11 at 2. The petition alleged that this would be "in the best interest of the child." *Id.* The petition also asked for confirmation that Zimmerman owed \$14,738.55 in medical support. *Id.* at 4. Bochenkova subsequently filed a second amended petition, which repeated the allegations of physical and emotional abuse and that denying Zimmerman access to Marina was in her best interest. Ex. 12. Again, Zimmerman filed nothing denying the allegations. Ex. 14.

The agreed final order. On June 16, 2014, the court entered an Agreed Order in Suit to Modify Parent-Child Relationship. Ex. 13. All questions of fact were submitted to the Court for decision, and the Court made the specific findings that "the material allegations in the petition to

modify are true” and that “the requested modification is in the best interest of the child.” *Id.* at 2. The order removed Zimmerman as a managing conservator. *Id.* Zimmerman retains the title “possessory conservator,” but the order states that he “shall have no possession of or access to the child.” *Id.* at 6. The order confirmed that 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.” *Id.* at 6.

The order ends with a Mother Hubbard clause, “all relief requested in this case and not expressly granted is denied,” making it the final order Zimmerman requested. Ex. 13 at 9. Zimmerman signed the order “approved and consented to as to both form and substance.” *Id.* at 10. His attorney approved as to form. *Id.* The final order remains in effect, and the docket sheet reflects no further proceedings. Ex. 14.

## **2.      *The Austin Bulldog* article.**

*The Austin Bulldog* is a nonprofit independent online news site for investigative reporting in the public interest. Ex. 18 ¶ 1. Ken Martin is its founder, publisher and editor. *Id.*

On October 9, 2014, *The Austin Bulldog* published an article entitled “Candidate Lost Custody Over Abuse” that reported on Martin’s investigation into Zimmerman’s divorce and custody proceedings and his interview with Zimmerman. Ex. 2. *The Austin Bulldog* also published an email notice to subscribers with a link to the website article. Ex. 3.

The article recounts the allegations of abuse made in the custody proceedings. Ex. 2. The article references the medical records, the Fox affidavit, and it recounts the course of the child custody proceedings. *Id.* And, although the court records contain no denial of abuse, Martin interviewed Zimmerman and the article recants, at length, his position: No abuse occurred, and his “remarkable teenage daughter” is a liar willing to commit perjury.

“I got a call from CPS and consulted a couple of attorney friends and was told when lies are made you should demand proof of the allegations and if you don’t get proof you should not cooperate,” Zimmerman told *The Austin Bulldog* in a Tuesday telephone interview.

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“Asked if he did those things to his daughter, Zimmerman replied, “Those are unequivocal lies. They are outright fabrications and absolute lies.”

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When questioned in the Tuesday interview about the alleged threat to kill his daughter, Zimmerman replied, “That’s an outright lie. None of this has ever been shown to me.”

When reminded that the cited medical records are in the files for his divorce case, Zimmerman replied, “These allegations are news to me. I’ve never seen them before. These are offensive lies and I’ve never seen them before. I’m not afraid because these are lies.”

Ex. 2. The article quoted Zimmerman calling his ex-wife “a brilliant manipulator and liar” and his claim that “I’m 54 and never in my life have I been violent against anyone. I’ve never shown violence. I get angry. I’m angry now when someone lies and attacks my character.” *Id.*

Asked to comment on the injunction, Zimmerman said, “The crux of it is that with people willing to lie under oath I’m not going to see my daughter any more. If I persist what would have come next would be false allegations of sexual abuse,” Zimmerman said.

*Id.*

*The Austin Bulldog* article ended by including links to the final decree of divorce and to fifty-two pages of court records, including the Fox affidavit and the medical records, allowing readers to review the source materials for themselves. Ex. 2; Ex. 18 ¶ 4.

### **3. Zimmerman’s lawsuit.**

After the article was published, Zimmerman’s attorney demanded a “retraction” from *The Austin Bulldog*. Ex. 15. Bill Aleshire, counsel for *The Austin Bulldog*, responded with a 7-page letter explaining why Zimmerman had no basis for a libel claim. Ex. 16. Zimmerman sued anyway. Litigation counsel for *The Austin Bulldog* then gave Zimmerman a chance to dismiss the lawsuit voluntarily before this motion was filed. Ex. 17. He did not.

Zimmerman's Petition, as it must, identifies the language in *The Austin Bulldog* article that allegedly defames him. See *Kahn v. Beicker Engineering, Inc.*, No. 04-94-00823-CV, 1995 WL 612402, at \*2 (Tex. App. – San Antonio Oct. 18, 1995, writ denied) (dismissing libel suit for failing, after grant of special exceptions, to “set out the particular defamatory words or at least their substance and meaning”), *cert. denied*, 117 S. Ct. 720 (1997). The complaints about the article and the email are essentially identical. Ex. 1 ¶¶ 11-25.5. The Petition identifies four aspects of the publications that allegedly defame Zimmerman, each of which is addressed below. None comes close to showing that *The Austin Bulldog* article is not a substantially true report of a judicial proceeding.

**i. “Candidate Lost Custody Over Abuse.”**

Taken directly from the Petition, here are Zimmerman's complaints about the headline:

*Mr. Zimmerman did not ‘lose custody.’ Texas is a state that utilizes conservatorship model, and not the custody model. No abuse was ever testified to in court. The article stated that Zimmerman lost custody. That is not a legal term used in Texas. Zimmerman still is a possessory conservator. Ex. 1 ¶¶ 11, 15, 25.2.*

Zimmerman is wrong. He did, in fact, “lose custody,” and custody is, in fact, “a legal term used in Texas.”

First, Zimmerman cannot rely on technical legal meanings to prove that the article is defamatory or false. “[A]n allegedly defamatory publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.” *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 154 (Tex. 2004) (quoting *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000)). Whether a publication is substantially false “depends upon the meaning a reasonable person would attribute to a publication, and not to a technical analysis of each statement.” *Id.* In common usage, “custody” means “the act or right of guarding; especially such a right granted by a court,” and “care, supervision, and control exerted by

one in charge.” <http://www.thefreedictionary.com/custody>. Under any ordinary definition of the word, Zimmerman “lost custody,” were the Court ordered that he have “no possession of or access to” Marina. Ex. 13 at 6.

Moreover, “custody” is a legal term in Texas, and Zimmerman *did* “lose custody” as defined by Texas law. The Family Code defines “legal custody” as “the managing conservatorship of a child.” Tex. Family Code § 152.102(11). Texas law defines a “child custody proceeding” as “a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue,” including “a proceeding for ... neglect, abuse, ... and protection from domestic violence in which the issue may appear.” *Id.* § 152.102(4). It defines a “child custody determination” as “a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child.” *Id.* § 152.102(3).

The divorce decree named Zimmerman joint managing conservator, so he began with “legal custody,” as Texas law defines it. Under Texas law, the petition to modify initiated “a child custody proceeding;” the agreed order rendered a “child custody determination;” and Zimmerman’s removal as joint managing conservator resulted him losing “legal custody.” The article’s statement that Zimmerman “lost custody” is therefore absolutely correct.

The record also confirms that Zimmerman lost custody “over abuse.” All three iterations of the petition to modify alleged that he “has a history or pattern of mental and physical abuse” and sought to deny him access to his daughter for that reason. Exs. 6, 11, 12. Each alleged that it was in Marina’s best interest that Zimmerman be denied any contact with her. *Id.* Zimmerman filed nothing denying the allegations. Ex. 14. And, critically, Zimmerman signed and approved an order as to form *and substance* finding “that the material allegations in the petition to modify are true and that the requested modification is in the best interest of the child.” Ex. 13 at 2, 10. The “material

allegations” were, of course, his “history of physical and emotional abuse” of Marina. So, not only do the judicial records reflect a Court finding of abuse, they reflect Zimmerman’s express *approval* of that finding.

Zimmerman’s claim that “no abuse was testified to in court” is likewise false. The petition to modify was supported by Fox’s sworn affidavit recounting the abuse he witnessed, plus verified medical records documenting Marina’s outcry and Dr. Neitsch’s decision to report the abuse to Child Protective Services. If Zimmerman is claiming there was no *live* testimony of abuse, this is a distinction without a difference. Fox’s sworn affidavit was “testimony,” and Zimmerman’s agreement to the temporary order obviated the need for live testimony. In any case, *The Austin Bulldog* article nowhere states that “abuse was testified to in court.” The article clearly identifies Dr. Neitsch’s medical records and Fox’s affidavit as the sources for the descriptions of each incident of abuse. Ex. 2.

**ii. “District 6 Council candidate Don Zimmerman injured, alienated daughter, court records state.”**

Zimmerman’s second complaint about the article is that

*No court order of any kind ever states that Zimmerman injured or alienated his daughter. Mr. Zimmerman never alienated his daughter. Ex. 1 ¶¶ 12, 16, 25.3.*

This complaint is based on a misrepresentation of *The Austin Bulldog* article. The article says “court *records* state,” not a “court *order* states.” Ex. 2. The article clearly identified what “court records” it was referring to: Fox’s affidavit and the medical records that recount Marina’s injuries at the hands of her father. *Id.*

Moreover, as noted above, the final court order *does* reflect a finding, approved by Zimmerman himself, that Zimmerman had “a history of mental and physical abuse” of his daughter, and that denying him access was in her best interest. Ex. 13. Therefore, even if the article *had*



reported that a “court order” states that Zimmerman injured or alienated his daughter,” it would have been accurate.

Likewise, Zimmerman’s own filings (and lack thereof) confirm that he was “alienated” from his daughter. He filed nothing disputing the evidence of abuse. Ex. 14. He agreed that a temporary injunction denying him any access to or communication with his daughter was in her best interest. Ex. 9. He left that injunction in place for over three years, making no effort to regain custody or even the right to talk to his daughter. Ex. 14. He filed a motion admitting that his relationship with his daughter is “fairly non-existent” and that he has “no interaction” with her. Ex. 10. His motion sought nothing but entry of a final order and removal of the injunction – no custody, access or other parental rights whatsoever. *Id.* To “alienate” means “to make indifferent or hostile,” or “to turn away.” <http://dictionary.reference.com/browse/alienate>. Under any reasonable meaning of the word, the court record – particularly the absence of any effort by Zimmerman to regain any legal access to his daughter – qualifies as “alienation.” Again, the article was accurate.

**iii. Don Zimmerman had “permanent loss of parental rights through civil court action.”**

Zimmerman next quibbles with *The Austin Bulldog* on legal terminology:

*Mr. Zimmerman did not “permanent[ly] lose parental rights. Mr. Zimmerman is still a conservator of his daughter. Permanent loss of parental rights prevents any parenting whatsoever. No court record found that Zimmerman’s “aggression in disciplining his daughter” resulted in “permanent loss of parental rights.” Ex. 1 ¶¶ 13, 17, 25.4.*

This complaint is not just inaccurate, it is disingenuous. The court records, in fact, show that *Zimmerman himself* asked that a *temporary* order denying him fundamental parental rights be made into a *final order* that, likewise, denied him custody and any access to his daughter.

As noted, after the allegations of abuse were made, Zimmerman agreed to a temporary order denying him any right to access or communicate with Marina. Ex. 9. Zimmerman left that

“temporary” order in place for over three years without challenge. Then – during the year he decided to run for City Council – Zimmerman’s new lawyer and campaign treasurer sought “a final order to resolve the current temporary orders.” Ex. 10; Ex. 4. Then, without a fight, Zimmerman signed a final order denying him “possession of or access to” his daughter. Ex. 13 at 6.

Zimmerman is apparently arguing that the article’s language, “permanent loss of parental rights,” implies formal “termination of the parent-child relationship” under Chapter 161 of the Texas Family Code. But the article did not use the word “termination,” nor did it say that Zimmerman lost “all” parental rights. It said he lost “parental rights.” Ex. 2. Zimmerman certainly lost the most fundamental parental rights – custody and access. It is unclear what meaningful “parental rights” Zimmerman claims he retains, but he admits his relationship with his daughter is “fairly non-existent,” Ex. 10, and not much parenting can be done without custody or access.

To the extent that Zimmerman is alleging that the article libeled him by reporting that his loss of custody was due to “aggression in disciplining his daughter,” the court records show that this phrase was generous to Zimmerman. The medical records and the Fox affidavit do not describe an effort to discipline; a more accurate description is parental bullying or, as Dr. Neitsch categorized it, child abuse. The court order found that Zimmerman had “a history of mental and physical abuse,” not “aggressive discipline.” And – again being generous to Zimmerman – the article did not even report arguably the most disturbing fact: Marina’s documented report that Zimmerman believed “she had demons that needed to be expelled,” and Dr. Neitsch’s observation that “the whole demonic possession thing is really scary.” Ex. 7 at 2; Ex. 8 at 4.

**iv. Doctor reports state that Mr. Zimmerman “on separate occasions” “inflicted bruises, pulled Marina’s hair, pushed her, and ‘threatened to kill her.’”**

Zimmerman’s final complaint is that *The Austin Bulldog* reported “hearsay:”

*At no point does the email/article express that these statements are not the doctor's conclusions but are pure allegations, and they are hearsay transcribed by the doctor. Statements regarding the doctor's reports in the article never state that the statements of alleged abuse by the doctor are repeated hearsay. The article never makes the distinction that these are all reported by the daughter but never confirmed by any external investigation, and that the doctor's opinion is based solely on the child's allegations. Petition ¶¶ 14, 18, 19, 25.1.*

*At no point was there any finding that Zimmerman threatened to kill his daughter in the court order or opinion. ¶ 25.5.*

News reporting is not governed by the Texas Rules of Evidence, but in any case this claim is baseless. *The Austin Bulldog* article made clear that Dr. Neitsch's conclusions was based on her examinations of Marina. The article discusses the medical records under three sections identified as "Doctor's first examination," "Doctor's second examination," and "Doctor's third examination." Ex. 2. Moreover, the article included by hyperlink the complete medical records themselves, allowing any reader to see the primary sources underlying the article. Ex. 18 ¶ 4. No reasonably intelligent reader could conclude from the article that Dr. Neitsch saw the actual abuse. *See New Times, Inc.*, 146 S.W.3d at 157 ("[T]he hypothetical reasonable person ... does not represent the lowest common denominator, but reasonable intelligence and learning.).

Zimmerman's claim that "the doctor's opinion is based solely on the child's allegations" is also false. Dr. Neitsch performed physical examinations of Marina, saw the bruises on her arm and back, and saw her limping. Ex. 7 at 2, 4, 5. Dr. Neitsch also had the benefit of Bochenkova and Fox having overheard Zimmerman's verbal abuse during a phone call from Marina. Ex. 8 at 2-4.

Dr. Neitsch's records confirm that she believed Marina was in danger. She recorded that Marina faced "a life-threatening situation." Ex. 7 at 5. She planned to contact CPS. *Id.*<sup>2</sup> She recommended that Marina's mother "pursue full legal custody as soon as possible." *Id.* She warned

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<sup>2</sup> Texas law requires a doctor who believes that a child has been abused to report to government authorities within 48 hours her "belief that a child has been or may be abused or neglected ... ." Tex. Family Code. §§ 261.101(a); 261.102.

that “this was the most common cause of homicide in Texas and in our area” and “needs to be taken seriously.” *Id.* And, perhaps most tellingly, she used ICD code E967.0, the diagnostic code for “perpetrator of child and adult abuse by a father, stepfather or boyfriend.”<sup>3</sup> *Id.*

Zimmerman’s final complaint, that there was no “finding” “in the court order or opinion” that he threatened to kill his daughter, is a straw-man argument. Ex. 2. The article does not state that there was any such “finding.” It accurately attributes the source as Dr. Neitsch’s medical records: “*The reports state that ... Zimmerman ... ‘threatened to kill her.’*” *Id.* While there may not have been a court finding, a medical doctor clearly recorded her fear that Marina faced a “life threatening” physical threat from her father, including “homicide.” Ex. 7 at 5.

#### **IV. Conclusion and Prayer.**

This lawsuit is based on the Defendants’ exercise of their right to free speech and to petition, as defined in the Texas Citizen Participation Act. The Plaintiff cannot prove that *The Austin Bulldog* article is substantially false. The article is, in fact, a substantially true report of Zimmerman’s divorce and custody proceedings, and thus it is privileged from suit.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Court, after hearing, grant this Motion to Dismiss, enter a final judgment dismissing the Plaintiff’s claims with prejudice, and, pursuant to Tex. Civ. Prac. & Rem. Code § 27.009(a), award 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 and further relief to which the Defendants may be justly entitled.

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<sup>3</sup> <http://www.findacode.com/icd-9/e967-0-child-adult-abuse-male-partner-childs-icd-9-code.html>.

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANTS  
AUSTIN INVESTIGATIVE REPORTING PROJECT,  
d/b/a THE AUSTIN BULLDOG, and  
KEN MARTIN**

**CERTIFICATE OF SERVICE**

I hereby certify that on November 25, 2014, a true and correct copy of the foregoing was served as shown below:

Stephen Casey  
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/s/ Peter D. Kennedy  
Peter D. Kennedy

**EXHIBITS IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS PURSUANT TO  
CHAPTER 27, TEX. CIV. PRAC. & REM. CODE**

1. Original Petition.
2. *The Austin Bulldog* article.
3. *The Austin Bulldog* email.
4. Excerpt from Austinites for Zimmerman website.
5. Final Decree of Divorce, *In the Matter of the Marriage of Kateryna Zimmerman and Donald Shelley Zimmerman and in the Interest of Marina Zimmerman, a Child*, No. FM5-00710, 201<sup>st</sup> Judicial District, Travis County, Texas.
6. Petition to Modify Parent-Child Relationship, *In the Interest of M.Z., a Child*, No. D-1-FM-05-000710, 201<sup>st</sup> Judicial District, Travis County, Texas.
7. Affidavit for Business Records (Dr. Deborah Neitsch, M.D.), *In the Interest of M.Z.*
8. Petitioner's Supporting Affidavit (Eric Fox), *In the Interest of M.Z.*
9. Agreed Temporary Injunction, *In the Interest of M.Z.*
10. Respondent's Motion to Enter Final Order re: Temporary Orders of Feb. 16, 2011, *In the Interest of M.Z.*
11. First Amended Petition to Modify Parent-Child Relationship and to Confirm Medical Support Arrearage, *In the Interest of M.Z.*
12. Second Amended Petition to Modify Parent-Child Relationship and to Confirm Medical Support Arrearage, *In the Interest of M.Z.*
13. Agreed Order in Suit to Modify Parent-Child Relationship, *In the Interest of M.Z.*
14. Docket Sheet, *In the Interest of M.Z.*
15. Letter from Zimmerman counsel/campaign treasurer demanding retraction.
16. Letter from counsel for *The Austin Bulldog* responding to retraction demand.
17. Letter from counsel for *The Austin Bulldog* prior to filing Chapter 27 motion.
18. Affidavit of Ken Martin.