

**REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. D-1-GN-14-004290**

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

DEFENDANTS' MOTION TO DISMISS

On the 5th day of January, 2015, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Amy Clark Meachum, Judge Presiding, held in Austin, Travis County, Texas:

Proceedings reported by machine shorthand.

APPEARANCES

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DEFENDANTS' MOTION TO DISMISS

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1 THE COURT: This is GN-14-4290, Don
2 Zimmerman vs. Austin Investigative Reporting Project
3 d/b/a The Austin Bulldog, and Ken Martin.

4 Let me go ahead and take the attorney
5 announcements for the record.

6 MR. KENNEDY: This is Pete Kennedy with
7 Graves Dougherty representing the defendants.

8 MR. ROGERS: David Rogers representing
9 the plaintiff with Mr. Casey on the phone, also
10 representing the plaintiff.

11 THE COURT: All right. Now, I am
12 proceeding with a record, but does everyone believe a
13 record's appropriate, or is this a nonrecord hearing?

14 MR. KENNEDY: It's a nonevidentiary
15 hearing, Your Honor. We requested a record because
16 Mr. Martin has a bit of a hearing problem, and he
17 wanted to make sure there was a transcript that he
18 could read afterwards. So that's why we've asked for
19 one and we're getting one.

20 THE COURT: You're okay with a record?

21 MR. ROGERS: No objection, Your Honor.

22 THE COURT: All right. Then we are going
23 to proceed on the record at this time. And I have
24 previously ruled that this Court did have jurisdiction,
25 and I do not want to revisit that ruling. And so at

1 this time, I am prepared to hear the motion to dismiss
2 as it stands, which is really -- well, why don't you
3 tell me, Mr. Kennedy, where you think we are. Come to
4 the podium.

5 **ARGUMENT BY MR. KENNEDY**

6 MR. KENNEDY: Sure. Well, Your Honor, I
7 believe we're here on the Defendants' Chapter 27 Motion
8 to Dismiss, which requests particular relief, starting
9 with a dismissal with nonsuit of the lawsuit because
10 the notice of nonsuit that Mr. Zimmerman filed was
11 without prejudice to refile and on the request under
12 Chapter 27 for an award of reasonable attorney's fees,
13 costs, litigation expenses, and sanctions, as provided
14 for under Chapter 27, should the defendants prevail.

15 Since we had the last motion, the
16 plaintiff filed their response to -- their substantive
17 response to the motion on Friday afternoon of last
18 week. And then under the Court's order, we filed a
19 reply to that about 10:30 or so this morning. The
20 Court should have on the bench a notebook that we put
21 together that includes the previous filings, the same
22 stuff from the notebook that we gave at the last
23 hearing, plus the plaintiff's response, and then our
24 reply. So, hopefully, the Court has the full set of
25 materials there before it.

1 And to proceed with the merits of the
2 motion, Your Honor, this -- I'll be short on this
3 piece, but this is a very important motion we believe.
4 This is a lawsuit filed by a candidate for Austin City
5 Council against a small nonprofit local media
6 organization claiming he was libeled in the course of
7 his campaign for City Council. Mr. Zimmerman has now
8 won that seat. He's now an elected public official.

9 To my memory, Your Honor -- and I've been
10 defending libel cases in Austin since 1990, this is the
11 first time a candidate for City Council has ever sued
12 the local media. And as I think we have demonstrated
13 in our motion, the lawsuit is utterly without basis in
14 law or fact.

15 I have just a summary of how we got to
16 where we are in the lawsuit. I have prepared a brief
17 chronology for the Court and really for myself to walk
18 through. The article at issue was published by The
19 Austin Bulldog on October 9th, 2014, during the
20 campaign for City Council.

21 The next day, Mr. Casey, who is both
22 Mr. Zimmerman's attorney and his campaign treasurer,
23 wrote a letter to the Bulldog demanding a retraction.
24 Three days later, Bill Aleshire, representing the
25 Bulldog, wrote a seven-page response back explaining

1 two key things: One, the existence of the Fair Report
2 Privilege under Chapter 72 of the Civil Practice &
3 Remedies Code, which allows the media to report on
4 judicial proceedings; and Chapter 27, the new Texas
5 Citizens Participation Act. His letter was ignored.
6 Mr. Zimmerman filed suit anyway two days later, suing
7 both the Bulldog and its founder, Ken Martin.

8 I was retained as trial counsel on
9 November 7th. I signed a letter on behalf of
10 defendants to Mr. Zimmerman's counsel saying that if a
11 lawsuit wasn't dismissed within a week, we would
12 proceed to file the Chapter 27 notice or motion that
13 Mr. Aleshire had informed them of. I got no response.
14 The lawsuit was not dismissed. November 25th I filed a
15 Chapter 27 motion, and by agreement, we set it for
16 hearing on December 18th.

17 December 16th was the runoff election.
18 Mr. Zimmerman prevailed in the runoff election for
19 District 6 that evening in a close race. At 9:46 p.m.,
20 he filed notice of nonsuit without prejudice. Two days
21 later we have the hearing, and Mr. Zimmerman takes the
22 position that because he nonsuited before the motion
23 was heard, the Court lacked jurisdiction to enter any
24 remedy against Mr. Zimmerman for filing the lawsuit
25 under the TCPA, and that even though the dismissal was

1 without prejudice, the Court lost all jurisdiction to
2 enter any remedy at all. The Court disagreed with
3 that, found it had jurisdiction. Mr. Zimmerman, as I
4 said, filed his response to the merits on Friday. We
5 filed our reply today.

6 If the Court looks at the petition, which
7 is Exhibit 1 to the motion to dismiss, the petition
8 identifies four allegedly defamatory statements that
9 appear in The Austin -- The Austin Bulldog article.
10 The reply filed on Friday abandons three out of four of
11 these statements. The reply makes no effort to defend
12 the allegation of libel in three out of four of the
13 statements. It raises only a single statement in the
14 article that it now claims -- or that it claims is
15 defamatory.

16 Now, we'll talk about the substance of
17 that in a second. But under Chapter 27, there is a
18 burden-shifting procedure that the Court goes through.
19 The defendants, the movants, have the initial burden to
20 demonstrate that the lawsuit relates to the exercise of
21 the defendants' free speech or petition rights, and it
22 defines those rights within the statute.

23 Our motion shows that this lawsuit
24 relates to both free speech and petition rights under
25 the statute. Very simply the right to petition

1 involves anything related to a judicial proceeding. We
2 reported about a judicial proceeding. It actually
3 falls within the language of Chapter 27, with the right
4 to petition. Even more obviously, this is an article
5 about a candidate for City Council, and it is a matter
6 of public concern. And Chapter 27 defines the right of
7 free speech as speech related to a matter of public
8 concern, also as a matter related to government or
9 public official.

10 The plaintiff's response filed Friday
11 doesn't actually argue that we haven't met our Chapter
12 27 burden. There isn't anything in there that says we
13 haven't met our burden of showing that the lawsuit
14 relates to the defendants' exercise of free speech or
15 the right to petition.

16 There is a passing reference we note in
17 there that Mr. Zimmerman characterizes his custody
18 proceeding as old. And to the extent that's a
19 suggestion that the custody proceeding was not a matter
20 of public concern, Your Honor, that's incorrect for two
21 reasons.

22 One, it wasn't old. The custody
23 proceeding, the initial allegations of abuse took place
24 just three years prior to the election. And during the
25 election year itself in March, Mr. Zimmerman filed --

1 himself reopened the custody proceeding, filed a motion
2 to enter a final order.

3 The abuse allegations were repeated in
4 filings in -- in April and in May of 2014, and the
5 court entered an agreed order finding that those
6 allegations were true and finding that it was in the
7 best interest of the child that Mr. Zimmerman have no
8 access or contact with her whatsoever. That order was
9 entered in June 2014, the election year.

10 So this news was not old. It was
11 something that was going on right as Mr. Zimmerman was
12 declaring his candidacy for City Council. Moreover,
13 the motion record shows that Mr. Zimmerman himself made
14 the issue important. His campaign materials named his
15 daughter by name. His campaign materials referred to
16 his second wife by her last name, Zimmerman, and then
17 referred to his daughter as Marina Zimmerman. Now, she
18 didn't use -- doesn't use that name anymore. And the
19 campaign materials leave the impression that
20 Mr. Zimmerman is part of a three-person household with
21 his wife and his daughter.

22 What The Austin Bulldog article did is
23 provide context to that claim in his campaign
24 materials. The portion of his website reflecting that,
25 Your Honor, is Exhibit 4 to the motion. And you'll see

1 the campaign website refers to, My wife Jennifer Winter
2 Zimmerman, who is his second wife, not the mother of
3 Marina. And then he says, I have one remarkable
4 teenage daughter, Marina Lorna Zimmerman. She now goes
5 by Lorna Bochenkova, not by Marina Zimmerman. And, of
6 course, there's nothing in here to say that
7 Mr. Zimmerman lost all right of custody or access to
8 that remarkable daughter in his campaign materials.

9 So if he injects the image of a happy
10 family and mentions his daughter by name, you can't
11 claim then that the public is not -- or has no reason
12 to be interested in the true facts of the relationship
13 between him and that daughter.

14 So, our position, Your Honor, is it's
15 very -- it's very simple that the defendants showed
16 that Chapter 27 applies and that the burden then shifts
17 to Mr. Zimmerman to meet his burden under Chapter 27.
18 And contrary to his characterization of it in response,
19 this is not a slight burden. It's a very important
20 one.

21 Chapter 27 requires the plaintiff who has
22 filed the lawsuit to come forward with clear and
23 specific evidence of a *prima facie* case of each element
24 of their claim. And -- although you could argue if the
25 case warranted it, and this one doesn't, what exactly

1 clear and convincing -- or clear and specific evidence
2 means, but the case law has at least made clear now
3 that it means you cannot rely on conclusory statements,
4 and you can't rely on inferences to support your burden
5 of clear and specific evidence.

6 What the parties do agree on, though, is
7 that Mr. Zimmerman has the burden in the libel case of
8 proving falsity, and that's a constitutional matter
9 because he's a public figure or a public official. He
10 has to prove that the article was false.

11 The gloss that the plaintiffs miss in
12 their response is that falsity under both the
13 Constitution and common law means substantial falsity,
14 which means you can't quibble about minor inaccuracies.
15 The plaintiff has to show that the gist, the overall
16 gist of the article was more harmful to his reputation
17 than the literal truth was. And, Your Honor, I'll show
18 in a minute that that's an impossible burden for them
19 to meet.

20 The one statement in the response or the
21 one part of the article in the response that plaintiffs
22 now complain about is -- they don't actually quote any
23 language from the article in the response that it was
24 false. But what they say is, the article falsely
25 suggested or reported that Dr. Neitsch, Marina's

1 pediatrician, herself concluded that -- or -- either
2 witnessed or concluded. It's a little hard to tell
3 what the plaintiffs allege. Either she witnessed or
4 concluded that Marina had been subject to abuse by
5 Mr. Zimmerman.

6 Two responses -- really three responses
7 to that. The first is, that isn't what the article
8 says. There is no way a reasonable reader could read
9 this article and conclude that Dr. Neitsch witnessed
10 the abuse. The articles in Exhibit 2 of the motion,
11 which the Court will see it, that the article clearly
12 identifies the three doctor visits, where the medical
13 records come from, as the doctor's first examination,
14 the doctor's second examination, and the doctor's third
15 examination. It's absolutely clear that the article is
16 saying the evidence of abuse comes from a doctor
17 examining a child.

18 Even more clearly, the article
19 specifically says that each incident occurred during
20 evening or weekend visits when Zimmerman had sole
21 possession, as authorized in the divorce decree.
22 Again, making it absolutely clear the doctor did not
23 witness this, but that the incidents happened when
24 Zimmerman had possession of his daughter.

25 So the article doesn't say what they say

1 it says. Even if it did, a review of the doctor's
2 records, which are in Tab 7 in the motion, show that
3 she did, in fact, conclude that Marina had been subject
4 to abuse, and she recorded those conclusions in some
5 detail on Page 5 of the exhibit. Each page is a
6 different day's doctor visits.

7 Page 5 is the third visit, or her records
8 of the third visit, and you'll see the structure of the
9 doctor's record. At the top it has a subjective
10 portion where the doctor records subjective impressions
11 provided by the patient, and then below that is the
12 objective information, and then below that is the
13 doctor's assessment.

14 The doctor's assessment specifically
15 finds abuse by father, stepfather, boyfriend in Point 2
16 of her assessment. It even uses the code, the specific
17 Medical Diagnostic Code E967.0, which is the code that
18 doctors use to record a diagnosis of abuse.

19 Below that, in Section 1 of her Plan, she
20 records her concerns of abuse with hip and shoulder
21 strain. This is the doctor recording her
22 recommendation, if CPS does not intervene, that this
23 could lead to a life-threatening situation. She
24 records her recommendation that they pursue full legal
25 custody. Below that she records her recommendation or

1 her advice to the mother and stepfather that domestic
2 violence is the most common cause of homicide in Texas.
3 This is the doctor's records recording her assessment
4 that she thinks Marina was in a life-threatening
5 situation. Even if The Austin Bulldog had reported --
6 had reported that the doctor concluded there was abuse,
7 it would be absolutely true.

8 Even more conclusively, Your Honor, in
9 response to that petition -- well, the doctor's records
10 were filed in connection with the mother's petition to
11 modify custody. The mother and the father were both
12 co-managing -- co-managing conservators at the time of
13 the divorce. Mr. Zimmerman had custody on alternating
14 weekends.

15 The doctor records went into the Court
16 file with a motion to modify, to deny Mr. Zimmerman any
17 access whatsoever to his daughter. The petition, which
18 is -- well, actually the petition was filed three
19 different times. The initial petition is Exhibit 6.
20 And on Page 2 of Exhibit 6, the petition alleges that
21 respondent has a history or pattern of physical and
22 emotional abuse directed against Marina Zimmerman.
23 That's the allegation in the petition to modify, to
24 remove Mr. Zimmerman as the managing conservator.

25 When Mr. Zimmerman filed his motion --

1 well, let me back up. After that motion, an agreed
2 order was entered in 2011, a week after the petition
3 was filed, and an agreed temporary injunction, which is
4 in Exhibit 9, was entered denying Mr. Zimmerman any
5 access to his daughter whatsoever, no communication, no
6 access. That order stayed in place for two years --
7 three years, excuse me.

8 In 2014, Mr. Zimmerman himself files a
9 motion to have a final order entered in the petition to
10 modify custody. He files, with Mr. Casey representing
11 him, a motion to enter a final order, which is Exhibit
12 10. He doesn't ask for any custody of his child. He
13 doesn't ask to access Marina whatsoever. He just asks
14 for a final order to be entered and the injunction to
15 be removed.

16 The mother then files successive amended
17 petitions to modify, both of which repeat the
18 allegation that Mr. Zimmerman has a history or pattern
19 of physical and emotional abuse directed at his
20 daughter.

21 The next thing that appears in the Court
22 file is Exhibit 13, and it is an agreed order. There
23 is nothing in the file that Mr. Zimmerman files, where
24 he denies the allegations in the original, first, or
25 second amended petition to modify. There is nothing in

1 the Court file where he denies the allegations of
2 abuse.

3 The next thing in the Court file, after
4 the second amended petition, is an agreed order entered
5 by this court, by the Travis County district court,
6 where on Page 2, it recites findings at the top.

7 THE COURT: Which one are you on? I'm
8 sorry.

9 MR. KENNEDY: I'm sorry. I'm jumping
10 around, aren't I, Judge. Exhibit 13. You see
11 Exhibit 13, this is June 16, 2014. District court
12 enters an agreed order. And on Page 2 at the top, the
13 agreed order says, The Court finds that the material
14 allegations in the petition to modify are true, and
15 that the requested modification is in the best interest
16 of the child. The material allegations in the motion
17 to modify are obviously, indisputably the allegations
18 of the history of mental and physical abuse of the
19 daughter. No other grounds were asserted to remove
20 Mr. Zimmerman's right to access his daughter.

21 That agreed order, as the Court will see
22 on the last page of Exhibit 13, on Page 10, signed by
23 Mr. Zimmerman, agreed and consented to as to both form
24 and substance. This is a judicial admission by
25 Mr. Zimmerman that he had a history of physical and

1 mental abuse of his child. That order was signed by
2 Mr. Casey, the lawyer who filed this lawsuit, on the
3 same page approved as to form. But Mr. Casey and
4 Mr. Zimmerman both signed an order where Mr. Zimmerman
5 admitted the allegations of abuse of his daughter were
6 true.

7 So, the report -- The Austin Bulldog's
8 report that the medical records reflected the doctor's
9 conclusion that Mr. Zimmerman's daughter was subject to
10 abuse are true, as shown by the doctor records, and are
11 indisputable by Mr. Zimmerman because he signed an
12 agreed order admitting to the abuse.

13 So even though it is Mr. Zimmerman's
14 burden to come forward and show that the article was
15 false, on the one statement that they attempt to defend
16 in their response on Friday, they have no possibility
17 of showing that it is false because, in fact,
18 Mr. Zimmerman admitted that it's true.

19 There's a second way, it may be redundant
20 now, that the plaintiffs prevail on their Chapter 27
21 burden, which is a plaintiff -- I'm sorry, defendant
22 can also show an affirmative defense. And if the
23 defendant shows an affirmative defense by a
24 preponderance of the evidence, the motion must be
25 granted.

1 And Mr. Zimmerman -- I'm sorry. The
2 defendants have pled as an affirmative defense the
3 privilege in Chapter 72 to -- to a fair, true, and
4 impartial report of the original proceeding, and they
5 have shown the fact that the article is an accurate
6 report of the judicial proceeding. It has -- it
7 accurately reports what was decided in the proceeding
8 to the extent the plaintiffs claim that the article is
9 mistaken in implying that there was a court finding of
10 abuse. They're simply wrong because that is what is
11 shown in the report -- in the agreed order.

12 Now, a reading of the article doesn't
13 support the interpretation that the article says, The
14 Court found that there was abuse. But even if it did,
15 that's what the Court found.

16 Now, I've also prepared a summary of what
17 The Austin Bulldog could have reported and been
18 absolutely privileged under Chapter 72. The headline
19 it could have used and the statements that it could
20 have written in the article, and as the Court will see
21 when it reads the article, the Bulldog was far more
22 fair than the judicial report was, than the judicial
23 records are.

24 Bulldog could have reported that Austin
25 City Council District 6 candidate lost all access to

1 his only daughter after admitting in court to a history
2 of physical and mental abuse, because it's true. It
3 could have reported he was divorced in 2005. He was
4 accused of physically/mentally abusing his daughter.
5 He agreed to a temporary injunction denying him any
6 access. He sought a permanent order without seeking to
7 gain access or custody. He entered into an agreed
8 order that found it was in the best interest of his
9 daughter not to have access to him. Signed and
10 approved that order and his lawyer signed and approved
11 that order as to form. We could have reported that he
12 filed nothing in court denying the allegations and
13 stopped there. And that would have been a fair, true,
14 and impartial report of a judicial proceeding.

15 But that's not what Mr. Martin did.
16 Mr. Martin called up Mr. Zimmerman, got his response,
17 and reported at length Mr. Zimmerman's denial that he
18 abused his daughter and his accusations that his
19 daughter and his ex-wife are liars.

20 So Mr. Martin was more fair to
21 Mr. Zimmerman than the Court record was, because there
22 are no such denials in the Court record, but the
23 Bulldog went ahead and got his reaction and published
24 it in the story.

25 Under the substantial truth doctrine,

1 there is no way that Mr. Zimmerman can prove that the
2 article's gist is more harmful to Mr. Zimmerman's
3 reputation than the truth would be because the article
4 balanced the court record with Mr. Zimmerman's
5 contemporaneous denial of having committed any abuse.

6 This is all clear as could be from
7 reading the article. The fact that the abuse was
8 admitted and there were court findings of the abuse,
9 are indisputable, they're in the court record, and
10 they're signed off by the plaintiff himself and the
11 plaintiff's lawyer who filed this lawsuit.

12 Your Honor, I don't think there could be
13 a clearer example of a lawsuit that was filed without a
14 factual or legal basis known by both the plaintiff and
15 his lawyer that the basis of the lawsuit was invalid,
16 that there was nothing to the lawsuit, and that the
17 subsequent actions of the plaintiff and his lawyer in
18 not filing any response to the motion, in nonsuiting
19 without prejudice after he won the election, and then
20 arguing that they thought they could do it because they
21 thought sanctions couldn't be entered if they filed a
22 nonsuit.

23 It's as clear an example of what the
24 Legislature was trying to prevent when it passed the
25 Texas Citizens Participation Act. I don't think you

1 could have a clearer example of this than an elected
2 official attacking a small nonprofit media because he
3 didn't like negative reporting, and then using this
4 Court to intimidate a small media entity into not
5 reporting negatively on him even though the report was
6 absolutely not accurate.

7 So that's the purpose of the motion.
8 Your Honor, you'll see that this isn't the only time --
9 that the Bulldog was not the only target of
10 Mr. Zimmerman's wrath, that he also made the same
11 demand on the Austin Monitor, which is another
12 nonprofit media organization that covers the news. And
13 that according to the Monitor's own article, it took
14 down the article because it feared a lawsuit from
15 Mr. Zimmerman. That's in -- in our reply brief,
16 Exhibit, I think it's, 20 or 21.

17 THE COURT: If I grant your motion to
18 dismiss, you would like the case dismissed with
19 prejudice? Is that my understanding?

20 MR. KENNEDY: Yes, Your Honor.

21 THE COURT: And, also, you believe you're
22 entitled to attorney's fees. What would I look to to
23 see the support for your attorney's fees.

24 MR. KENNEDY: The Act itself, Section
25 27.009(a), which is in Tab 9 or 10, I think, to Your --

1 to Your Honor's notebook. I'm sorry, my numbering
2 switched.

3 THE COURT: 8 is Chapter 27.

4 MR. KENNEDY: Yeah. 27.009(a) says, "If
5 the court orders dismissal of a legal action under this
6 chapter, the court shall award to the moving party
7 court costs, reasonable attorney's fees, and other
8 expenses incurred in defending against the legal action
9 as justice and equity may require; and sanctions
10 against the party who brought the legal action, as the
11 court determines sufficient, to deter the party who
12 brought the legal action from bringing similar actions
13 described in this chapter."

14 And then a final point, Your Honor, is,
15 it is no -- it is not --

16 THE COURT: But what is the amount you
17 are seeking, I guess is what I'm --

18 MR. KENNEDY: Oh, I'm sorry. We filed --
19 we filed an affidavit --

20 THE COURT: And that's attached as?

21 MR. KENNEDY: -- attorney's fees. Yeah,
22 which should be in the notebook, which really just
23 reflects the fees up until the hearing, the actual and
24 then estimated through the initial hearing. The
25 plaintiffs argue that I spent too much time preparing a

1 motion to dismiss the lawsuit. But, you know, the
2 Court can take a look at my time records and decide
3 whether it thinks they're reasonable or not.
4 Obviously, I spent a considerable amount of time since
5 then reviewing and filing our -- our reply, but
6 it's the Court's decision on what is reasonable, but
7 the statute makes it award fees and a separate sanction
8 mandatory.

9 Now, it is no -- we do not dispute that
10 we filed this motion before Mr. Zimmerman served
11 citation. Mr. Zimmerman made extreme allegations about
12 Mr. Martin's journalistic ethics and his accuracy in
13 reporting, made those publicly in a lawsuit.

14 THE COURT: Okay. Wait. You filed --
15 there was a motion to dismiss filed under Chapter 27
16 before your client was served?

17 MR. KENNEDY: Before we were served,
18 that's right. That's right. And I address that in the
19 reply brief because they raise it in their response.
20 And there is clear case law now that says a party need
21 not wait around for the plaintiff to serve them before
22 filing a Chapter 27 motion. The *James vs. Calkins* case
23 and *Rauhouser vs. McGibney* case both say that, that
24 it's not necessary to wait to be served.

25 It makes sense for several reasons.

1 It's -- clearly the intent was to have this lawsuit
2 hanging over Mr. Martin and The Bulldog's head during
3 the election campaign. They nonsuited it after
4 Mr. Zimmerman won. They nonsuited it without
5 prejudice, so the lawsuit continues to hang over their
6 head until next fall when limitations would expire.
7 And Mr. Martin has the right to defend against these
8 kind of baseless allegations about his reporting that
9 are made in open court. And so we did not wait to file
10 the motion to dismiss this lawsuit, and we've been
11 perfectly up front about that.

12 THE COURT: Were you served eventually?

13 MR. KENNEDY: Well, we filed an answer.

14 THE COURT: Okay.

15 MR. KENNEDY: Yeah, yeah. So it was not
16 necessary to serve. Yeah, we filed an answer to assert
17 the affirmative defenses and then we filed the motion
18 to dismiss. So unless the Court has questions, that
19 finishes my presentation.

20 THE COURT: No. Thank you.

21 MR. KENNEDY: Thank you.

22 THE COURT: You may proceed.

23 **ARGUMENT BY MR. ROGERS**

24 MR. ROGERS: If it may please the Court.
25 Thank you, Your Honor. To begin with, the place where

1 learned opposing counsel left off, the amount of
2 attorney's fees, we believe that that is clearly
3 excessive. Among the criteria that the Court has to
4 look at in determining attorney's fees, what was
5 necessary in terms of attorney's fees? They hadn't
6 even been served yet, no answer was necessary,
7 therefore, no expenditure of attorney's fees at that
8 time was called for.

9 Additionally, the amount itself, I
10 believe, is astronomical. I'm not a stranger to First
11 Amendment or to election law cases. Up against the
12 legendary Buckwood. I prevailed in a City Council
13 contest in Wimberley for \$5,000 all in. I represented
14 the Green Party of Texas, actually in this courtroom
15 under the judge who was here previously. I brought
16 with me two other much more senior attorneys, including
17 a former Texas Supreme Court justice. We were -- we
18 had an all day -- almost all day hearing in front of
19 the Honorable Judge Dietz. He ruled against the Green
20 Party of Texas. We appealed it to the Texas Supreme
21 Court. We won. The whole thing, including the appeal
22 to the Texas Supreme Court, was just over \$38,000. Not
23 one hearing for 22.

24 Additionally, I represented some
25 individuals in Andrews County over an election dispute

1 for a -- a nuclear bond, nuclear waste bond where there
2 was an allegation that some 96 votes were improperly
3 cast and an election decided by a margin of three
4 votes. We had an all day trial out in Andrews County.
5 We did an appeal to the El Paso Court of Appeals. The
6 whole thing was done for just under \$21,000.

7 And, finally, in a First Amendment prior
8 restraint case I had in front of Judge Sparks, where
9 Judge Sparks found that there was no First Amendment
10 prior restraint, we went to the Fifth Circuit, got the
11 Fifth Circuit to overturn Judge Sparks on that point.
12 And he found that the reasonable and necessary
13 attorney's fees on that First Amendment prior restraint
14 by the City of Austin was \$2,500.

15 So we think that the amount is clearly
16 excessive. Additionally, some of the work that's done
17 in there is clearly sort of paralegal work that's being
18 charged as attorney fees. We think that's excessive.

19 We think that the burden shifting is
20 important, but that also what is important is the
21 substantial falsehood. And I think opposing counsel
22 did correctly focus on a substantial falsehood as what
23 was the relevant test. And it's fairly clear or at the
24 very least it would be a -- a jury question, that the
25 article leads one to believe that the doctor actually

1 either witnessed abuse or believed that there was
2 abuse. And a close reading of the reports themselves
3 by the doctor does not support that reading of what
4 happened. However, the article would mislead an
5 ordinary reasonable reader into thinking, Oh my God,
6 the doctor found that there was abuse.

7 What happened was, there was a report to
8 the doctor, the doctor has his/her legal obligation,
9 reported that report, in just the same way that a judge
10 or an attorney or a social worker would have that kind
11 of professional obligation to report that allegation to
12 CPS. Whether it's true or not, the fact that the
13 allegation has been made places an obligation on a
14 school teacher or any of those other professionals that
15 interact with children, to report that to CPS.

16 The -- the article under the three
17 documented incidents represents this as if the doctor
18 knew that -- I'll quote here from the article, "Her dad
19 had been yelling at her and threatened to hit her. He
20 has threatened to kill her. But the doctor didn't hear
21 that. The doctor didn't find that. This is an
22 allegation that's made, a serious allegation, but the
23 doctor's not the one making the allegation. The doctor
24 is reporting hearsay.

25 And additionally, the report goes on to

1 say that the February 11, 2011 doctor's reports states
2 concerns of abuse, recommend if CPS does not intervene,
3 this could lead to a life-threatening situation. What
4 it does not indicate is how that appears in the
5 doctor's report. And, again, when you contrast what's
6 actually in the doctor's report with what is in the
7 Bulldog article, you can see that one is not an
8 entirely accurate reading of the -- of the other.

9 Interestingly, the phrase, which opposing
10 counsel has brought to the Court's attention several
11 times, in the final ruling by the Court, that the
12 material allegations in the petition to modify are true
13 does not specify what allegations are material.
14 Obviously, allegations regarding the jurisdiction of
15 the Court are material, obviously allegations regarding
16 who are the parties are material.

17 The question about whether an allegation
18 of this or that is a material allegation is vague, and
19 I think the reading by opposing counsel is an
20 over-reading. Additionally, of course, clear and
21 specific and clear and convincing evidence are a
22 different burden.

23 But the specificity question, I think,
24 gets to our request for discovery, because, of course,
25 opposing counsel is suggesting that we need to know

1 about the subjective mental impressions of the reporter
2 who wrote this article. Without at least a minimal
3 level of discovery, it is -- that raises an impossible
4 burden.

5 In order to know about the subjective
6 mental impressions of the reporter, we have asked for a
7 very limited discovery where we ask for e-mail with
8 specific targeted key words for the individuals that
9 are part of this, and we think that that will give us
10 the -- the actual malice elements that we need.

11 The key here, Your Honor, is that a
12 paraphrase, when it's done carefully, of course, is,
13 even if inaccurate, might not be libelous. Now, the
14 problem here is that the paraphrase was not done
15 carefully, and it was done in such a way as to lead a
16 reader to believe that a doctor had confirmed that
17 Mr. Zimmerman had abused his child.

18 What, in fact, happened was, that a
19 doctor observed the child, observed certain physical
20 symptoms, listened to claims that the child made, but
21 the doctor did not make an independent confirmation of
22 abuse. And we think that that is critical and that
23 that is defamatory.

24 Additionally, Your Honor, republishing
25 these claims in 2014, that does not immunize them. The

1 allegations were obviously originally made in 2011, and
2 the subsequent motions appear to be mostly word
3 processor-generated. And the publication by the
4 Bulldog of those allegations, if that's all they were
5 doing, would be privileged.

6 We concede that if they are reporting
7 accurately -- and that's a key, accurately, the
8 judicial proceedings, then they would be subject to
9 privilege. But they are paraphrasing inaccurately, not
10 the judicial proceedings, but the statements of a
11 doctor in an abbreviated report. And that, Your Honor,
12 is the defamation, and we believe that we have met our
13 burden on the burden-shifting scheme at that point.

14 Give me just one moment to make sure we
15 have hit all of the -- the elements. And our reading
16 of those elements, of course, Your Honor, is not
17 something we pulled out of thin air. Mark Walker of
18 Cox, Smith & Matthews has written a fairly substantial
19 article, which we have attached for the convenience of
20 the Court, that talks -- that puts all of this in sort
21 of a detached academic view of how all of this plays
22 together.

23 Clearly, everyone admits that defendants
24 published a statement of fact, that it referred to the
25 plaintiff. The question opposing counsel seems to have

1 put forward is whether the statement was, in fact,
2 false. We believe it was, or at the very least that
3 would be a jury question.

4 The subjective malice, again, that's
5 going to require us to get into some discovery. And
6 let's see the -- the e-mails. You know, did he know,
7 did he have doubts, did he express those to anybody?
8 We should be able to get that. Did -- did he fail to
9 check, which would be negligence.

10 And, of course, the other question is, is
11 it per se defamation to call somebody a child abuser?
12 It might be, in which case, malice and negligence
13 aren't necessary. And clearly, of course,
14 Mr. Zimmerman has suffered injury to his reputation
15 based on these -- on these allegations, Your Honor.

16 Finally, Your Honor, because this
17 reporting is more than the judicial proceeding alone,
18 that the reporting is on, and because the reporting is
19 of things that are outside the judicial proceeding, we
20 don't believe that a judicial proceeding privilege
21 covers all of the statements that the Bulldog made in
22 its article. Thank you, Your Honor.

23 THE COURT: All right. Mr. Kennedy, you
24 get the final word.

25 **ARGUMENT BY MR. KENNEDY**

1 MR. KENNEDY: Sure. Just briefly, Your
2 Honor. A couple of things, one, because I looked it up
3 not knowing it myself, as to what the doctor's
4 obligation is to report on abuse and whether it -- the
5 obligation occurs whether or not the doctor believes
6 the abuse.

7 It's not accurate to say they've got to
8 report it either way, and we quote this in Footnote 2
9 of our initial motion and then again on our reply. The
10 Texas Family Code requires in Section 261.101(a) and
11 261.102, and you read it together, the doctor must
12 report to authorities within 48 hours her belief that a
13 child has been or may be abused or neglected. It is a
14 subjective belief standard that triggers the obligation
15 to report; otherwise, anybody whoever heard any kid
16 that reported abuse, whether they believed it or not,
17 would have to report it to the authorities. It's
18 subjective.

19 So when the doctor reports in her records
20 that she intends to contact CPS, that means she has
21 subjectively concluded that the daughter has been or
22 may be abused or neglected.

23 And the other legal issue, Your Honor, is
24 what their burden is on -- on fault, right? So you've
25 got to prove substantial falsity that the article is

1 not true and then you've got to prove a level of fault
2 in libel cases.

3 Because Mr. Zimmerman is a public figure
4 and public official -- the *New York Times vs. Sullivan*
5 doctrine requires him to prove actual malice. Actual
6 malice -- and we quote this in the reply brief -- is a
7 term of art, and it means knowledge of the substantial
8 falsity or actual substantial doubts as to the truth.
9 That is subjective, Your Honor. But it's a subjective
10 state of mind as to whether they knew the article was
11 substantially false.

12 And since the plaintiffs have made
13 absolutely no showing that the article was
14 substantially false, there is no point for them to root
15 around in a reporter's note trying to find evidence
16 that they can't find because they've made no showing
17 that the article was false.

18 And finally -- well, a second issue about
19 libel law -- this is not briefed in their response, but
20 I heard opposing counsel suggest that if the nature of
21 the speech is libel per se, that they are -- that
22 removes the burden of proving negligence or actual
23 malice is just not true.

24 Libel, per se, removes the burden of
25 proving actual damages. But *New York Times vs.*

1 *Sullivan* imposes a First Amendment constitutionally
2 required burden of proving actual malice.

3 And, finally, to the extent there is any
4 issue or there was any issue about what the court
5 records say or what the medical records attached to the
6 court records say, the Bulldog put all of them on the
7 website, accessible by them, so that any reader who had
8 the slightest doubt in reading the article about what
9 those records said could simply click on a link and
10 read the whole records.

11 And so if there's any -- even reading the
12 face of the article, a reader could be confused about
13 what the Court record said, but in any case, they could
14 figure it out right there on the website and decide for
15 themselves what they wanted to conclude about the
16 evidence.

17 THE COURT: Do you want to address their
18 request for discovery at all?

19 MR. KENNEDY: Well, the only issue they
20 are seeking discovery on is to prove an element that
21 they have mistakenly characterized as common law
22 malice. And since the actual element is substantial --
23 I'm sorry, subjective knowledge of falsity, they would
24 have to prove not only that the article is false,
25 substantially false, but that Mr. Martin knew it was

1 MR. CASEY: Yeah. I think Mr. Rogers did
2 an excellent job. One thing I'll direct the Court to
3 is the substantial truth test, and that's contained in
4 *Neely vs. Wilson*, and what has happened -- and
5 Mr. Rogers was very specific in directing the Court
6 toward the doctor's record. And what *Neely vs. Wilson*
7 says, that if you're a media defendant and you are
8 reporting something, then you are required to report it
9 accurately. And if you juxtapose items next to each
10 other that misleads the reader or could mislead, the
11 actual statement under *Neely* is that if it even has the
12 possibility of misleading the reader, then you do not
13 qualify under the test for substantial truth.

14 And I believe Mr. Rogers may have a copy
15 of *Neely vs. Wilson* in front of you, but that was --
16 the substantial truth test was laid out. He was a
17 doctor who had been suspended and -- been suspended for
18 self-prescribing medication to himself before the Texas
19 Medical Board. Subsequent to that, the doctor had two
20 malpractice suits against him.

21 And what the media defendant did, it was
22 a Houston -- actually it was KEYE -- I apologize. It
23 was KEYE TV. And they had reported, Would you like to
24 know that your doctor had been suspended for
25 malpractice, who was using drugs, and, you know,

1 taking -- you know, itemizing those statements.
2 Neither of those statements were in and of themselves
3 directly false. The doctor had been suspended for
4 self-prescribing, the doctor had been sued for
5 malpractice, but when they put those two together, the
6 Texas Supreme Court said there's a fact issue because
7 you misled a potential reader to believe that those two
8 were actually true and directly connected.

9 And in this case the article, we would
10 submit, from the Bulldog did not accurately report the
11 fact that the doctor's report was purely hearsay. If
12 it had come out and said the doctor received hearsay,
13 there wouldn't be an issue today in court. And I --
14 and so that would be with respect to that.

15 The issue I bring up with the Court with
16 respect to discovery is that the same standard would
17 apply, for example, under a protective order, that we
18 would need to identify, just very narrowly, to see if
19 there's any communication or documents within the
20 possession of the Bulldog or Ken Martin that say, You
21 know, I really wanted to help Zimmerman. I really
22 don't like this guy to get to the malice prong.

23 And third, backing up to what the Court
24 identified and picked up very early, that there was no
25 suit hanging over Mr. Martin's head. He was under no

1 deadline to respond. As a matter of fact, we had
2 intentionally not served for quite awhile, and so there
3 was no urgency to jump on the gun or defend them. And
4 a lot of the urgency of this was self-created by the
5 defendant. And so that would be the conclusion of
6 anything I would contribute. I thank you for that
7 time, Your Honor.

8 THE COURT: All right. Thank you
9 everyone. Let's go ahead and go off the record. I'll
10 let you know.

11 *(Court adjourned.)*

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REPORTER'S CERTIFICATE

1
2
3 STATE OF TEXAS)
)
4 COUNTY OF TRAVIS)

5 I, Alicia Racanelli, Official Court Reporter in and
6 for the 201st District Court of Travis County, State of
7 Texas, do hereby certify that the above and foregoing
8 contains a true and correct transcription of all
9 portions of evidence and other proceedings requested in
10 writing by counsel for the parties to be included in
11 this volume of the Reporter's Record, in the
12 above-styled and numbered cause, all of which occurred
13 in open court or in chambers and were reported by me.

14 I further certify that this Reporter's Record of
15 the proceedings truly and correctly reflects the
16 exhibits, if any, offered in evidence by the respective
17 parties.

18 WITNESS MY OFFICIAL HAND this the 11th day of
19 January, 2015.

20
21
22 /s/ Alicia Racanelli
23 Alicia Racanelli, Texas CSR No. 3591
24 Expiration Date: 12/31/2016
25 Official Court Reporter, 201st District Court
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