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BY E-MAIL PDF

Professor David G. Oedel
Mercer University Law School
1021 Georgia Avenue
Macon, Georgia 31207

Dear Professor Oedel:

As Bennett Epstein advised you on Tuesday, we are attorneys representing Ira Glass and This American Life. As your letter dated April 8 to our clients is on the letterhead of Mercer University School of Law ("Mercer") and your April 14 press release also lists your status as Mercer faculty member, we shall regard you as acting in your capacity as a faculty member and agent of Mercer in your representation of Judge Amanda Williams with the resulting consequences to Mercer's and your respective rights and liabilities.

Our clients' broadcast and related web publication are the product of intensive investigative journalism and, consistent with Mr. Glass's professional reputation, represent fair, accurate and unbiased reporting. Your 14-page letter consists of a laundry list of items[1] which Judge Williams disputes or on which she has a different opinion, but it never rebuts the central theme that Judge Williams' Drug Court has procedures and acts in a manner different, and more punitive, than the national guidelines for Drug Courts prescribe. The fact that some of the Drug Court's procedures and actions are consistent with treatment afforded to persons charged or convicted of felonies in regular criminal courts (Oedel letter p. 9) is a rebuke to the underlying principles of a Drug Court, rather than a justification.

Mr. Glass repeatedly asked Judge Williams to give him an interview so she could respond to the statements of participants, lawyers and others about how the Drug Court operated. His efforts to afford Judge Williams, and her staff, every opportunity to provide information for the broadcast were truly extraordinary. Following an initial interview last October, he wrote to Judge Williams on February 28, 2011, March 3, 2011, March 4, 2011 and March 7, 2011 (by faxed letter and e-mail) to ask her to answer questions and provide information for the broadcast. I have attached copies of these letters in the event Judge Williams did not advise you about this. The written requests are only a part of his efforts, as Mr. Glass made multiple requests to Judge Williams or her staff by telephone voice messages and even sat in the Court's outer office day-

[1] We do not intend to address every detail you have listed in your 14-page letter, but rest assured that on behalf of Mr. Glass we reject all assertions of material inaccuracies, bias or unprofessional journalistic conduct. Any assertion not responded to should not be construed as an admission or acquiescence by our clients.

after-day waiting for the opportunity to speak with Judge Williams. But in all attempts he was rebuffed.

Judge Williams chose not to be interviewed by Mr. Glass in 2011 and her court staff also declined to be interviewed. So it is quite unseemly -- and demonstrably untrue -- to charge Mr. Glass with failing to request information from Judge Williams about her activities in the Drug Court. Of course, stonewalling provides no basis for a plaintiff to assert a claim for defamation because the plaintiff's views were not reflected in the publication. *Trapp v. Southeastern Newspapers Corp.*, 1984 U.S. Dist. LEXIS 24906, *41 (S.D. Ga. June 7, 1984) (granting summary judgment in favor of newspaper in libel law action brought by a former member of the city council in part because the reporter had tried to "contact the plaintiff to verify the information and received 'no comment.'"); *Moorhead v. Millin*, 542 F. Supp. 614 (D.V.I. 1982) (concluding newspaper acted without actual malice when it published a letter from the lieutenant governor of the Virgin Islands complaining about another public official's job performance when the reporter, before publication, contacted the same public official who said, "I have no comments to make."); *Bay View Packing Co. v. Taff*, 543 N.W.2d 522, 534 (Wis. Ct. App. 1995) (concluding food processor company, a limited purpose public figure, had failed to establish actual malice in a defamation action against a television station, its employees, and a city official based in part because the president of the company refused to appear on camera and give his "side of story" regarding a report that the company had failed to recall contaminated products); *Peck v. Dispatch Printing Co.*, No. 47 CA 86, 1987 WL 13553 (Ohio Ct. App. June 18, 1987) (same).

As a constitutional law professor, you already well know that robust speech and communications about the conduct of governmental institutions and officials is the core value protected by the Founders in the First Amendment. Due to its importance in our legal system, special protections are afforded to the right of citizens to discuss, evaluate and criticize public officials including judges and judicial personnel. While your passing reference to the Supreme Court's landmark decision in 1964 of *New York Times v. Sullivan* (p. 11) misstates its holding as applying to public figures, the opinion actually established the "actual malice" standard for reporting about public officials. The courts of Georgia have applied this Constitutional requirement to protect journalists against baseless claims of defamation by public officials and have required a public official to prove actual malice by clear and convincing evidence. *See, e.g., Murray v. Williams*, 305 S.E.2d 502, 503 (Ga. Ct. App. 1983) (affirming grant of summary judgment for newspaper and editorial columnist when transit authority board member failed to demonstrate actual malice). "Actual malice in a constitutional sense is not merely spite or ill will, or even outright hatred; it must constitute actual knowledge that a statement is false or a reckless disregard as to its truth or falsity." *Torrance v. Morris Publ'g Group, LLC*, 656 S.E.2d 152, 154 (Ga. Ct. App. 2007) (quotation omitted).

The plaintiff in a defamation or libel case has the burden of proving – by clear and convincing evidence – that the defendant acted with actual malice. *See, e.g., Miller v. Woods*,

349 S.E.2d 505, 507 (Ga. Ct. App. 1986) (reversing judgment entered in favor of police chief in libel action when police chief had failed to establish actual malice by clear and convincing evidence). This is a weighty burden. "[I]t is not sufficient to measure reckless disregard by what a reasonably prudent man would have done under similar circumstances nor whether a reasonably prudent man would have conducted further investigation. The evidence must show in a clear and convincing manner that a defendant in fact entertained serious doubts as to the truth of his statements." *Torrance*, 656 S.E.2d at 154 (quotation omitted). Unsupported inferences and conjecture regarding a defendant's motivation are not enough to establish actual malice, *Fine v. Communic'n Trends, Inc.*, 699 S.E.2d 623, 630-31 (Ga. Ct. App. 2010), and neither is evidence that the defendant disliked the plaintiff. *See, e.g.*, *Evans v. Sandersville Georgian, Inc.*, 675 S.E.2d 574, 578 (Ga. Ct. App. 2009).

But apart from the protections afforded to such important speech about governmental institutions and public officials, the substance of the broadcast is true, notwithstanding your strenuous and unsuccessful efforts to challenge factual details in the broadcast or the web article. Moreover, Mr. Glass had multiple sources for key factual statements on which he based his opinions about the nature of this Drug Court. While you challenge his opinion that this is the toughest drug court in the country, *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299 (N.Y. Ct. App. 1977), is only one of the cases holding that opinions about judicial behavior are not actionable in defamation. See also *Aisenson v. Am. Broad. Co., Inc.*, 269 Cal. Rptr. 379 (Cal. Ct. App. 1990) (judge a "bad guy"); *Kilcoyne v. Plain Dealer Publ'g Co.*, 678 N.E.2d 581 (Ohio Ct. App. 1996).

More importantly, Mr. Glass spoke with lawyers and national drug court experts who support the conclusions stated in the broadcast. You criticize Mr. Glass for not using the 29-page statistical report generated by Judge Williams' staff that covered time periods in the mid-1990s. That report shows a re-arrest rate that is neither 4 per cent as you claim in your letter, nor 5.5 per cent as you claim in your press release, but a far less favorable 30.1 per cent. Even if this report had contained any reliable information related to later periods, the refusal of Judge Williams or court personnel to speak with Mr. Glass prevented him from asking questions about the methodology of the report and its conclusions.

Your defenses of Judge Williams' procedures and conduct are weak. For example, Judge Williams acknowledged conduct includes holding persons without bail for 90 days and then releasing them on personal recognizance, which you appear to endorse as a laudatory practice. This is difficult to square with the Eighth Amendment prohibition against excessive bail. Tellingly you do not dispute the Drug Court procedure of confining persons to incarceration until further order of court and then at the Court's whim deciding to release them. Judge Williams' confinement practices for indefinite duration is not characteristic of the philosophy of Drug Courts and is certainly a matter of keen public interest about which Mr. Glass was appropriately reporting.

In addition, it is literally true that Lindsey Dills was interviewed in Arrendale State Prison. You criticize the broadcast for failing to note the significance that Brandi Byrd was arrested for DUI, but the broadcast states that very fact. (Web. Tr. 15).

Your defense of Judge Williams that it is desirable for a judge to give lawyers or defendants "a good scolding" reflects a peculiar view of judicial temperament that is not shared by many lawyers and judicial evaluation organizations. In any event, your letter does not dispute the accuracy of the report about the tenor Judge Williams' comments to litigants and the length of sanctions imposed on persons while in the Drug Court program.

Ms. Dills' father, whom you cite in your letter, was willing to share information with you as Judge Williams' attorney, but when Mr. Glass asked him to speak on the record, he refused. Mr. Glass reported this in the broadcast.

While you criticize Mr. Glass' reporting on the views of five participants in the Drug Court program as unreliable, the persons who have first hand experienced Judge Williams' Drug Court treatment are in fact in the best position to provide direct information about the process. Mr. Glass did not rely only on them, but also had as sources attorneys familiar with the Drug Court, attorneys elsewhere in Georgia and national experts about Drug Court procedures and philosophy.

You also suggest that confidentiality considerations, not fear of speaking out, was the reason that persons with knowledge about the Drug Court refused to speak. But your assumption does not bear scrutiny. Multiple sources told Mr. Glass that they would not speak to him for fear of adverse consequences. And when Mr. Glass obtained a notarized release from Ms. Dills allowing confidentiality to be waived for the release of her records, the sheriff said he would still not provide the information to Mr. Glass.

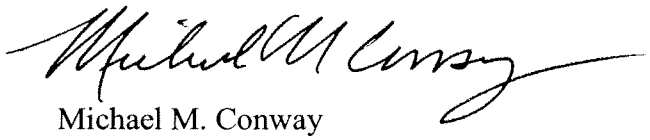
Mr. Glass had no doubt about the accuracy of his broadcast. As any good journalist, he reported that he had tried to interview others who could have provided knowledge and tried to obtain records withheld by public authorities, but he could not do so. If Judge Williams desired to comment, her comments would have been reported. If Judge Williams had not turned down Mr. Glass' request to record court proceedings, then the comments of Drug Court participants at their graduation ceremony could have been heard in their own words. But your client chose to block these requests for information.

Contrary to the press release you issued yesterday, Mr. Glass had quoted Jim Jenkins correctly about the possibility of appellate review of Judge Williams' sanctions against Drug Court participants for violations of the contract, but the statement may have been misunderstood to mean that habeas corpus relief or other appellate relief was totally unavailable. So he clarified that possibility. Your citation to the fact that Charlie McCullough got such extraordinary relief is an odd point to advance as Judge Williams' lawyer points out that Mr. McCullough had his

rights violated when his plea of guilty was accepted to such an extent that he was granted relief under this writ. Kim Spead was not part of the broadcast, but was included in the web version and Mr. Glass did correct that she was jailed apparently for failing to show up at court for a hearing to show cause why she should not be held in contempt for failure to pay the Drug Court fees rather than directly for failure to pay the fees.

Please contact me if you have any questions.

Sincerely,



Michael M. Conway

cc. I. Glass
B. Epstein