IN THE DISTRICT COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

NO. 03-18-00650-CV

ALEX E. JONES, INFOWARS, LLC, FREE SPEECH SYSTEMS, LLC,
AND OWEN SHROYER
APPELLANTS

v.

NEIL HESLIN
APPELLEE

ON APPEAL FROM CAUSE NUMBER D-1-GN-18-001842
53rd DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. SCOTT JENKINGS PRESIDING

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

On April 16, 2018, Appellee Neil Heslin sued Alex Jones, Owen Shroyer, Free Speech Systems, LLC, and InfoWars, LLC for defamation. [CR 5]. On July 13, 2018, InfoWars moved to dismiss Heslin's claim under the Texas Citizen's Participation Act. [CR 729].

On August 17, 2018, Appellee filed a Motion for Sanctions for Intentional Destruction of Evidence relating to the deletion of relevant internet materials. [CR 1421]. On the same day, Appellee also filed a Motion for Expedited Discovery. [CR 1438]. Appellee submitted proposed discovery requests relating to spoliation as well as the merits of the Motion to Dismiss. [CR 1773].

On August 27, 2018, Appellee filed his Response to the Motion to Dismiss [CR 1467], and he submitted the following evidence in support of his claims:

- The affidavit of former *Austin-American Statesmen* editor and current University of Texas professor Fred Zipp. [CR 1525-45].
- The affidavit of former Snopes.com editor Brooke Binkowski. [CR 1675-85].
- The affidavit of Appellee Neil Heslin. [CR 1710-13].
- The affidavit of former Connecticut Chief Medical Examiner Dr. Wayne Carver. [CR 1715-17].
- The affidavit of Scarlett Lewis, a witness personally acquainted with Appellee. [CR 1719-20].

- The affidavit of former InfoWars host John Clayton. [CR 1722-23].

- A digital copy of the June 26, 2017 InfoWars video reviewed by Mr. Zipp and Ms. Binkowski. [CR 1686].

- A digital copy of an interview with Dr. Wayne Carver reviewed by Mr. Zipp and Ms. Binkowski. [CR 1687].

- A transcript of an interview with Sandy Hook parents Chris and Lynn McDonnell reviewed by Mr. Zipp and Ms. Binkowski. [CR 1689-1707].

- Transcripts of other video evidence reviewed by Mr. Zipp. [CR 1547-1646].

- Mr. Zipp's affidavit in *Pozner, et al. v. Jones, et al.* [CR 1647-1673]

- A copy of the "Terms of Use" agreement from the InfoWars.com website. [CR 1725-70].

On August 30, 2018, the trial court held a hearing regarding the Motion for Expedited Discovery, the Motion for Sanctions, and the Motion to Dismiss. [RR 1]. During the hearing, the trial court stated it would grant discovery, and it ruled on InfoWars' objections to the discovery and otherwise limited the requests where appropriate. [RR 78-97; 121-136].

On August 31, 2018, the trial court issued an order granting the Motion for Expedited Discovery. [CR 2828]. The trial court ordered InfoWars to provide responses to written discovery within 30 days, and it ordered all four Appellants to appear for deposition by October 22, 2018. [*Id*]. The trial court

also extended the hearing under Tex. Civ. Prac. & Rem. Code §27.004, setting a date of November 1, 2018 to reconvene the hearing. [*Id*].

On the due date for written discovery, October 1, 2018, InfoWars refused to answer, stating in response to every request that "the discovery is not relevant to the motion," and that "the court was without authority...to order discovery information, documents and testimony." [CR 3099-3169]. Appellee filed a Motion for Contempt. [CR 3093]. The following day, InfoWars filed its Notice of Appeal. [CR 3175].

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is likely unnecessary under Rule 39.1(a) because the appeal is frivolous. The trial court had not yet ruled on the Motion, and InfoWars had no basis to appeal. In the event the Court does wish to examine the merits, Appellee agrees that the Court would be aided by oral argument.

ISSUE PRESENTED

Did the trial court err in failing to grant InfoWars' TCPA Motion even though the Motion had not yet been denied by operation of law, and even though Appellee provided *prima facie* evidence supporting his claim?

Suggested Answer: No, the trial court still had time to rule on the motion and reconvene the hearing. Yet even if the trial court was limited to 30 days following the August 30th hearing, InfoWars wrongfully withheld evidence

which it had been ordered to produce within that time period. Finally, even if no further evidence had been produced, Appellee nonetheless presented a *prima facie* case for defamation.

STATEMENT OF FACTS

I. Introduction

For the past five years in scores of videos and articles, InfoWars creator Alex Jones has waged a non-stop obsessive campaign to convince his viewers that the Sandy Hook school shooting was "a giant hoax," "synthetic," and "completely fake with actors." [CR 1663]. Because Mr. Heslin dared to speak out against Mr. Jones' malicious campaign of incomprehensible lies about Sandy Hook, InfoWars cast him as a liar, tarnished the memory of his son, and ultimately placed him and his family in danger. As far back as 2013, Mr. Heslin had been concerned over InfoWars and its maniacal fabrications about Sandy Hook, but he was determined not to dignify the allegations by acknowledging their existence. [CR 1710, ¶4]. But as Jones' inflammatory statements reached a wider audience, they were met by a growing tide of public indignation, and in June 2017, Megyn Kelly produced a feature story on the fallout from InfoWars' various accusations. Ms. Kelly convinced Mr. Heslin to appear for an interview to discuss the pain caused by InfoWars' lies about Sandy Hook. [CR 1710, ¶12].

During the interview, Mr. Heslin stated, "I lost my son. I buried my son. I held my son with a bullet hole through his head." [CR 1677, ¶25].

One week later, InfoWars retaliated with a cruel and false accusation against Mr. Heslin, delivered by InfoWars host Owen Shroyer. The premise of Mr. Shroyer's video was that Mr. Heslin was lying about having held his son's body and having seen his injury. Mr. Shroyer began the video by citing a blog post he found on an anonymous website called "Zero Hedge." [CR 1547]. Mr. Shroyer used the blog post as a launching point to make defamatory accusations against Mr. Heslin. He accomplished his defamation by using deceptively edited footage which he misrepresented as evidence of Mr. Heslin's guilt.

During the video, Mr. Shroyer showed a portion of an interview with medical examiner Dr. Wayne Carver describing the identification of the victims. [CR 435]. Mr. Shroyer misrepresented this portion of Dr. Carver's interview, along with a deceptively edited clip of Sandy Hook parent Lynn McDonnel, to falsely claim that the victims' parents were not allowed access to their children's bodies before burial. [CR 1683-84]. With an air of arrogant mockery, Mr. Shroyer claimed that Mr. Heslin's statements were "not possible." [CR 1548]. When Appellee learned about the video, he brought this lawsuit.

Given this background, Appellee was dismayed when he learned InfoWars had pled the defense of "substantial truth," and he was shocked when he read the following sentence in InfoWars' Motion to Dismiss:

> Plaintiff cannot avoid the clear fact that there was in fact a contradiction arising from the medical examiners statements when he claimed the bodies were not released to the parents. [CR 120].

This statement is an outrageous falsehood. There is no contradiction, and the medical examiner did *not* claim the bodies were not released to the parents, a fact which is obvious from his repeated statements *in the same interview* when he confirms multiple times that *the bodies were released to the parents*. In one example, shortly following the edited portion used by Mr. Shroyer, a reporter asked Dr. Carver if "all the children's bodies have been returned to the parents or mortuaries," and Dr. Carver confirmed that "as of 1:30, the paperwork has been done." [CR 1683, ¶59]. In the wildly out-of-context portion used by InfoWars, Dr. Carver was only discussing the initial identification process.

Nonetheless, despite Dr. Carver's clear statements, and despite copious media coverage of open-casket funerals, InfoWars has fabricated an absurd claim in its Sandy Hook mythology in which the parents were prohibited by authorities from seeing their children's bodies before burial. Mr. Jones has told his viewers that "the coroner said none of the parents were allowed to touch

the kids" and that "the stuff I found was they never let them see their bodies." [CR 402]. InfoWars has advanced this same disgraceful falsehood in litigation. It is reckless and dangerous to claim that Dr. Carver said, "the bodies were not released to the parents." [CR 120]. He said *no such thing*, and misrepresenting his statements only feeds the fanaticism of Jones' followers. That was exactly Mr. Shroyer's purpose in the defamatory video, but it is unsettling to see this strategy spill over into litigation. Even here, on appeal, InfoWars continues to maintain that "the coroner said (partly corroborated by another parent) the parents were not allowed contact with the bodies." [Appellant's Br. 32].

In this Brief, the Court will see how InfoWars dishonestly misrepresented video footage in a "calculated and unconscionably cruel hit-job intended to smear and injure a parent who had the courage to speak up about InfoWars' falsehoods." [CR 1528]. These facts establish a *prima facie* case for defamation, and none of InfoWars' frivolous defenses apply. For these reasons, Appellees asks the Court to remand this case for further proceedings.

II. The June 26, 2017 Video

Appellee brought suit based on a video InfoWars published to its own website and on YouTube on June 26, 2017. InfoWars falsely claims "there was no June 26 broadcast by any defendant." [Appellants' Br. 4]. InfoWars claims the publication challenged by Appellee occurred on June 25, 2017, in a two-

hour video entitled "Exclusive Feds Plan to Drop Russia Investigation Left Plans to Riot." [*Id*]. However, Appellee offered an affidavit from former *Austin American-Statesmen* editor and current University of Texas professor Fred Zipp, who testified that he reviewed "a July 26, 2017, YouTube video from InfoWars entitled 'Zero Hedge Discovers Anomaly in Alex Jones Hit Piece.'" [CR 1526]. A transcript and full digital copy of the June 26, 2017 video was attached to Mr. Zipp's affidavit. [CR 1547; 1686]. The video attached to Mr. Zipp's affidavit is just over five minutes long. Likewise, former Snopes.com editor Brooke Binkowski testified that she "reviewed a video published by InfoWars on YouTube on June 26, 2017 relating to an interview given by Sandy Hook parent Neil Heslin." [CR 1676]. Mr. Heslin, along with witnesses Dr. Wayne Carver and Scarlett Lewis, all stated they viewed the June 26, 2017 video. [CR 1711; 1716; 1719]. Appellees' petition identifies the specific InfoWars.com URL on which the June 26, 2017 video was published. [CR 8].

The June 26, 2017 video was edited from a much longer video published on June 25, 2017. The edited video was then published to the InfoWars website and to YouTube as separate content, with a separate title, and reaching separate audiences. In his show on July 20, even Mr. Jones referred to the title of the June 26, 2017 video rather than its June 25 predecessor, stating, "We're going to play the evil video: 'Zero Hedge Discovers Anomaly in Alex Jones Hit Piece.'" [CR

395]. The "single publication rule" does not prevent a lawsuit based on the new edited video because "a plaintiff is not limited to a single cause of action in the event the same information appears in separate printings of the same publication or in different publications…The single publication rule applies strictly to multiple copies of a libelous article published as part of a single printing." *Mayfield v. Fullhart,* 444 S.W.3d 222, 227 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). The trial court ordered InfoWars to respond to numerous discovery requests about the June 26, 2017 video, but InfoWars disobeyed the court and refused to answer. [CR 3101].

Mr. Zipp's affidavit described the origin of the June 26, 2017 InfoWars video:

> After Mr. Heslin condemned InfoWars' false statements about Sandy Hook during an interview with Megyn Kelly on NBC TV, InfoWars produced a video in which it claimed that Mr. Heslin's statements about his last moments with his child were a lie. InfoWars host Owen Shroyer began the video by citing an article from an anonymous blog called "Zero Hedge." The video shows that the anonymous blog post had been "shared" only three times before it was featured on InfoWars' video. InfoWars took this obscure blog post that almost nobody in the world had seen and used it to smear Mr. Heslin. [CR 1527].

In his interview, Mr. Heslin told Ms. Kelly that he buried his son, held his body, and saw his fatal injury. Regarding that interview, Mr. Shroyer stated the following in the June 26, 2017 video:

> The statement he made, fact checkers on this have said cannot be accurate. He's claiming that he held his son and saw the bullet hole in his head. That is his claim. Now, according to a timeline of events and a coroner's testimony, that is not possible.
>
> And so one must look at Megyn Kelly and say, Megyn, I think it's time for you to explain this contradiction in the narrative because this is only going to fuel the conspiracy theory that you're trying to put out, in fact.
>
> So -- and here's the thing too, you would remember -- let me see how long these clips are. You would remember if you held your dead kid in your hands with a bullet hole. That's not something that you would just misspeak on. So let's roll the clip first, Neil Heslin telling Megyn Kelly of his experience with his kid. [CR 1548-49].

Mr. Shroyer then played a clip from the Mr. Heslin's interview in which he stated, "I lost my son. I buried my son. I held my son with a bullet hole through his head." [CR 1527]. After playing the clip, Mr. Shroyer stated:

> So making a pretty extreme claim that would be a very thing, vivid in your memory, holding his dead child. Now, here is an account from the coroner that does not corroborate with that narrative. [CR 1549].

Mr. Shroyer then played a short clip from a news conference with Dr. Wayne Carver, the medical examiner at Sandy Hook. In the clip, Dr. Carver

stated that "we did not bring the bodies and the families into contact. We took pictures of them." [CR 435]. Dr. Carver stated in the clip that "we felt it would be best to do it this way." [*Id*]. Mr. Shroyer also showed a dishonestly edited clip of an interview with parents Chris and Lynn McConnel in which Anderson Cooper states, "It's got to be hard not to have been able to actually see her." [*Id*]. As will be shown below, these video clips were edited and intentionally presented in a deceptive fashion.

At the end of the video, Mr. Shroyer stated, "Will there be a clarification from Heslin or Megyn Kelly? I wouldn't hold your breath. [Laugh]. So now they're fueling the conspiracy theory claims. Unbelievable." [CR 1549]. Appellees sued Mr. Shroyer because he made the statements, and Mr. Jones is also liable because on July 20, 2017, during an episode of The Alex Jones Show, he republished Mr. Shroyer's defamatory segment in full ("And so I'm going to air this again, and I'm going to challenge that it doesn't violate, uh, the rules."). [CR 2416]. Free Speech Systems, LLC employs Mr. Shroyer as a reporter. [CR 59]. InfoWars, LLC operates the InfoWars.com website, where the challenged statements were also published. [CR 1725]. InfoWars, LLC is also responsible for the sale of dietary supplements sold during InfoWars programming and through the InfoWars.com website. [CR 1812].

LEGAL STANDARD

To survive a motion to dismiss under the TCPA, a defamation plaintiff must show *prima facie* evidence of the following:

> (1) a publication of a false statement of fact to a third party that was defamatory concerning the plaintiff,
>
> (2) with the requisite degree of fault, and
>
> (3) damages.

Exxon Mobil Corp. v. Rincones, 520 S.W.3d 572, 579 (Tex. 2017). *Prima facie* refers to the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *In re Lipsky,* 460 S.W.3d 579, 590 (Tex. 2015). The statute does not define 'clear and specific evidence,' but in *Lipsky,* the Supreme Court interpreted the phrase to mean more than "mere notice pleading." *Id.* "Though the TCPA initially demands more information about the underlying claim, the Act does not impose an elevated evidentiary standard or categorically reject circumstantial evidence." *Id.* at 591. As such, the Supreme Court "disapprove[d] those cases that interpret the TCPA to require direct evidence of each essential element of the underlying claim to avoid dismissal." *Id.* Instead, "pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to

dismiss." *Id.* Appellee far exceeds this burden, as he can produce direct evidence on each element of his claim.

ARGUMENT

I. The Trial Court Extended the Hearing, and InfoWars' Motion to Dismiss Remained Pending.

InfoWars claims the trial court had "no discretion to order discovery and then extend its time to rule on the motion beyond 30 days after the hearing in order to consider it." [Appellants' Br. 70]. This is wrong. A few months ago, Justice Busby of the 14th Court noted that at the time of a hearing on a TCPA motion, "the trial court could also choose to 'extend the hearing date' under section 27.004(c) to allow completion of the ordered discovery *and then hold a new hearing* with the benefit of that discovery." *In re Bandin,* 556 S.W.3d 891, 896–97 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (Busby, J., concurring) (emphasis added). "Under the TCPA, this choice belongs to the trial court, not to [Appellants]." *Id, citing Watson v. Hardman,* 497 S.W.3d 601, 611 (Tex. App.—Dallas 2016, no pet.). Here, the trial court made the choice to order discovery, extend the hearing date, and reconvene at a later time. [CR 2828]. InfoWars sabotaged that choice.

When InfoWars filed its Notice of Appeal, the Motion had not yet been denied by operation of law. The trial court had the discretion to "continue the

hearing on the motion to dismiss to allow for discovery." *Id.* at 894. The legislature "chose the word 'may,' making an extension of the hearing discretionary when discovery is ordered." *Id.* at 896. "Given the TCPA's short deadlines and the difficulty of obtaining some types of discovery on a precise timetable, the Legislature wisely left the trial court some discretion to manage discovery and schedule hearings to meet the deadlines." *Id.* When the trial court continued the hearing to allow discovery, the Motion remained pending for decision, and it would have remained pending until 120 days after service. *See* Tex. Civ. Prac. & Rem. Code. 27.004(c).

II. InfoWars Violated the Discovery Order and Withheld Evidence from the Trial Court.

On August 31, 2018, the trial court granted Appellee's Motion for Expedited Discovery, and it ordered InfoWars to respond "to written discovery within 30 days of service." [CR 2828]. Therefore, responses became due on October 1, 2018. However, even by InfoWars' erroneous reckoning -- in which the trial court lacked authority to extend the hearing -- the Motion would not be denied by operation of law until October 2, 2018. InfoWars faced a dilemma: It would be forced to answer discovery before it could attempt an appeal. InfoWars solved the dilemma by committing contempt of court. [CR 3093].

Even though the trial court had ruled that the requests were not objectionable, every response served by InfoWars stated "the discovery is not relevant to the motion," and that "the court was without authority...to order discovery information, documents and testimony." [CR 3099-3169]. Appellee immediately filed a Motion for Contempt. [CR 3093]. The following day, InfoWars filed its Notice of Appeal. [CR 3175].

"To be considered, any allowed discovery must of course be received before the trial court rules on the motion." *Bandin,* 556 S.W.3d at 896 (Busby, J., concurring). When InfoWars served its responses, "[t]hat deadline to rule [had] not yet passed, so there [was] still an opportunity for the trial court to receive and consider the discovery ordered." *Id.* In short, Appellee was entitled to the record on appeal that discovery would have provided.

III. The June 26, 2017 Video is Reasonably Susceptible of a False Impression.

In the June 26, 2017 video, Mr. Shroyer asserts that Mr. Heslin's statement -- "I lost my son. I buried my son. I held my son with a bullet hole through his head." -- was not possible. Yet as Mr. Heslin stated in his affidavit, "the June 26, 2017 video is false. I buried my son. I held his body. I saw a bullet hole through his head." [CR 1711].

Appellee submitted the affidavit Dr. Wayne Carver, the Connecticut chief medical examiner featured in the InfoWars video who "oversaw the process by which medical examinations were performed on victims of the Sandy Hook massacre." [CR 1715]. Dr. Carver stated that "upon completion of the medical examinations, the victim's bodies were released to the custody of funeral homes who had been engaged by the families," and that postmortem examination procedures "are designed so as not to interfere with usual American funereal practices." [*Id*]. As such, "medical examiners made no efforts to conceal injuries." [*Id*]. Dr. Carver stated that based on his personal knowledge, he knows "Mr. Heslin would have had an opportunity to hold his son's body and see his injuries if he chose to do so." [CR 1716].

In addition to the affidavits of Mr. Heslin, Dr. Carver, and Mr. Zipp, the falsity of Mr. Shroyer's accusation is also addressed in the affidavit of Brooke Binkowski. Ms. Binkowski is a Fellow in Global Journalism at the Munk School of Global Affairs with over twenty years of experience as a multimedia journalist and professional researcher. [CR 1675]. As part of her work, she has "routinely investigated claims made in media and on the internet to assess their validity," winning acclaim from her colleagues for her anti-disinformation work. [*Id*]. In her affidavit, Ms. Binkowski explained that the statements in the video created a false impression:

> Mr. Shroyer's statement was false. Mr. Heslin stated to Megyn Kelly that "I lost my son. I buried my son. I held my son with a bullet hole through his head." The evidence shows that Mr. Heslin lost his son, and that he buried his son, and that it was indeed possible for Mr. Heslin to hold his child and see the bullet wound.
>
> I have reviewed the affidavit of Dr. Wayne Carver, the Connecticut Medical Examiner cited in Mr. Shroyer's video…
>
> In addition, the funeral services in which the bodies were in the possession of the parents were widely reported in the press. Several of these services had open caskets.
>
> It was widely reported in the media that Connecticut Governor Dannel Malloy personally observed the body of a Sandy Hook victim during one of the services.
>
> There is no reasonable basis to conclude that Mr. Heslin would have been unable to hold his son and see his wound merely because the initial identification was performed by photograph, and there is no doubt that he did in fact bury his son. [CR 1677].

InfoWars' Motion to Dismiss disingenuously argued that "Plaintiff cannot avoid the clear fact that there was in fact a contradiction arising from the medical examiners statements when he claimed the bodies were not released to the parents." [CR 120]. InfoWars' Motion emphasized this falsehood, stating that "regardless of what others reported, the medical examiner stated that the bodies were not released." [*Id*]. This is the same blatant fabrication advanced by Mr. Shroyer. In the portion of the interview shown in the InfoWars video, Dr.

Carver was discussing the process for initial identification of the victims, which was performed by photograph. Regarding this identification process, Dr. Carver stated, that "we did not bring the bodies and the families into contact. We took pictures of them." [CR 1528]. Yet a few questions later, a reporter asks Dr. Carver if "all the children's bodies have been returned to the parents or mortuaries." [CR 1683, ¶59]. Dr. Carver responds, "I don't know. The mortuaries have all been called." [*Id*]. The reporter asks, "But they're ready to be released at this time?" [*Id*]. Dr. Carver responds, "As of 1:30, the paperwork has been done. The usual drill is that the funeral homes call us, and as soon as the paperwork is done, we call them back. That process was completed for the children at 1:30 today." [*Id*]. In response to another question, Dr. Carver stated that his "goal was to get the kids out and available to the funeral directors first, just for, well, obvious reasons." [CR 1683, ¶58].

In addition to misrepresenting Dr. Carver's statements, InfoWars also created a false impression by misrepresenting a CNN interview with Sandy Hook parents Chris and Lynn McDonnel. In the edited clip used by InfoWars, Mrs. McDonnel was asked: "It's got to be hard not to have been able to actually see her." [CR 2457]. Mrs. McDonnel began her answer by stating, "And I had questioned maybe wanting to see her." [*Id*]. InfoWars used this clip to demonstrate that Sandy Hook parents were not allowed to see their children's

bodies, thus making Heslin's statement impossible. However, Ms. Binkowski pointed out in her affidavit that the clip showed by InfoWars "cut off the end of Mrs. McDonnel's answer." [CR 1684, ¶61]. Her full answer stated:

> *And I had questioned maybe wanting to see her,* but then I thought, she was just so, so beautiful, and she wouldn't want us to remember her looking any different than her perfect hair bow on the side of her beautiful long blond hair. [CR 1694].

A couple questions earlier, Mrs. McDonnel stated that they "went to funeral home" where they were "able to be with her." [CR 1693-94]. Mrs. McDonnel later said that "when we left the room, it was certainly so hard to leave her because that would be the last time that we would be able to be with her." [*Id*]. In other words, it would have been clear to anyone who watched or read the interview that the McDonnels had the opportunity to see their child's body, but they chose not to view her body in that state. As Mr. Zipp stated in his affidavit, "Mr. Shroyer was only able to support his bogus accusations by using deceptively edited footage." [CR 1540]. In doing so, InfoWars published "false statements about [Appellee's] honesty or integrity." [CR 1528].

IV. The June 26, 2017 Video is Reasonably Susceptible of a Defamatory Meaning.

InfoWars next argues that the statements could not be interpreted as defamatory. The determination to be made under the TCPA is whether "the

statements were reasonably susceptible of a defamatory meaning." *Musser v. Smith Protective Services, Inc.,* 723 S.W.2d 653, 654 (Tex. 1987). In other words, the court must determine if the video "is capable of bearing the meaning ascribed to it by [plaintiff] and whether that meaning is capable of a defamatory meaning." *Skipper v. Meek,* 03-05-00566-CV, 2006 WL 2032527, at *5 (Tex. App.—Austin July 21, 2006, no pet.) Here, the only meaning of the statements is defamatory. Mr. Zipp's affidavit outlines the facts which would be interpreted as defamatory, and how the circumstances demonstrate Mr. Shroyer's video "was a calculated and unconscionably cruel hit-job intended to smear and injure a parent who had the courage to speak up about InfoWars' falsehoods." [CR 1528].

Mr. Zipp noted that "Mr. Shroyer also made it clear that he was not accusing Mr. Heslin of an innocent mistake." [CR 1529]. Mr. Zipp emphasized Mr. Shroyer's comment that the event is "not something that you would just misspeak on" because "you would remember if you held your dead kid in your hands with a bullet hole." [*Id*]. Under Texas law, a statement can be defamatory if it contains "the element of disgrace or wrongdoing." *Means v. ABCABCO, Inc.,* 315 S.W.3d 209, 215 (Tex. App.—Austin 2010, no pet.). Here, an element of disgrace or wrongdoing is "a reasonable construction of the [video's] gist." *D*

Magazine Partners, L.P. v. Rosenthal, 529 S.W.3d 429, 441 (Tex. 2017), *reh'g denied* (Sept. 29, 2017). Indeed, it is the only possible gist.

Appellee also submitted the affidavits of Dr. Wayne Carver and Scarlett Lewis. Both are personally acquainted with Neil Heslin. Dr. Carver understood that "the InfoWars host was asserting that it was impossible for Mr. Heslin to have held his son and seen his injuries." [CR 1716]. He also "understood the comments by InfoWars to be an attack on Mr. Heslin's honesty and integrity," and that the video "was intended to reinforce the validity of Mr. Jones' prior statements about Sandy Hook, and act as further evidence that the event was staged." [*Id*]. As such, Dr. Carver "also understood the InfoWars' comments to implicate Mr. Heslin in criminal conduct, such as making false statements to government officials or engaging in other forms of criminal misrepresentation." [*Id*]. Similarly, Scarlet Lewis testified that she understood the video to be asserting that Appellee "was lying about having held the body of his son, and that Mr. Heslin was engaging in a fraud or cover-up of the truth regarding the Sandy Hook massacre." [CR 1719]. Ms. Lewis also testified that she "understood Mr. Shroyer to be making the claim that Mr. Heslin was working in collusion with the media, specifically Megyn Kelly, to perpetrate a fraud on the public." [*Id*]. Based on the context and history of InfoWars' statements about Sandy

Hook, Ms. Lewis also understood the video "to implicate Mr. Heslin in criminal conduct." [*Id*].

In addition, Mr. Zipp explained that "[t]he InfoWars video was not only false and disparaging, but also influential; after it appeared, a group of irrational and dangerous conspiracy fanatics turned their attention to Mr. Heslin." [CR 1531]. Mr. Zipp concluded that "[t]he InfoWars video exposes Mr. Heslin to ridicule and contempt, and it is reasonable to believe that it could encourage bad actors who could become a threat to his safety." [*Id*].

V. The June 26, 2017 Video Could be Understood as Making Assertions of Fact.

A statement is considered a fact if it is verifiable, and, if in context, it was intended as an assertion a fact. "A statement that fails either test—verifiability or context—is called an opinion." *Dallas Morning News, Inc. v. Tatum,* 554 S.W.3d 614, 638 (Tex. 2018). Here, both Mr. Zipp and Ms. Binkowski explained how Mr. Shroyer's remarks were an assertion of verifiable fact. Likewise, Shroyer's statements pass the "context test" because a viewer could understand Shroyer to be asserting a fact. Under the context test, a statement is only an opinion if it "cannot be understood to convey a verifiable fact." *Id.* at 639. Here, Mr. Shroyer "asserted that Mr. Heslin's statement is not possible, and he cited

evidence. He was unequivocal in his statements." [CR 1677, ¶24]. Mr. Zipp observed that:

> Mr. Shroyer did not equivocate in his statements about Mr. Heslin. Mr. Shroyer claimed Mr. Heslin's statement about holding his son was "not possible." He also referenced the involvement of unspecified "fact-checkers," which obviously signals an assertion of fact, not an opinion. [CR 1539].

Mr. Shroyer's language leaves no room for anything but a factual accusation. Mr. Shroyer indicated his accusation was based on his review of the evidence he found, not his personal opinion ("According to a timeline of events and a coroner's testimony..."). [CR 1548]. He did not use any terms to qualify his statements. Yet even hedge words would not shield Mr. Shroyer's accusation. "As Judge Friendly aptly stated: '[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Bentley v. Bunton,* 94 S.W.3d 561, 583–84 (Tex. 2002). After all, "an opinion, like any other statement, can be actionable in defamation if it expressly or impliedly asserts facts that can be objectively verified." *Campbell v. Clark,* 471 S.W.3d 615, 625 (Tex. App.—Dallas 2015, no pet.). Moreover, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still

imply a false assertion of fact." *Id.* at 627–28. Finally, the tone of the video was presented as an informational news broadcast. The style of the video is consistent with the script, which asserts Mr. Heslin's statements are "impossible" due to evidence discovered by "fact-checkers." The video can only be interpreted as a statement of fact, not opinion.

VI. InfoWars Cannot Hide Behind the Anonymous Zero Hedge Author.

InfoWars argues that its defamatory video is protected because it was merely reporting the allegations made by a third party. However, InfoWars is not entitled to the benefit of the new third-party allegation statute, and its video was clearly defamatory under the existing common law rules, which the statute only modified for certain defendants. Even if the statute did apply, InfoWars' conduct would nonetheless prevent its application.

A. InfoWars is not entitled to claim protection under Tex. Civ. Prac. & Rem. Code § 73.005.

InfoWars' Brief claims that it is entitled to protections of the new third-party allegation statute, which reads: "In an action brought against a newspaper or other periodical or broadcaster, the defense [of substantial truth] applies to an accurate reporting of allegations made by a third party regarding a matter of public concern." Tex. Civ. Prac. & Rem. Code § 73.005. This statute was created as an exception for certain defendants to the Supreme Court's decision

in *Neely,* which held that "there is no rule in Texas shielding media defendants from liability simply because they accurately report defamatory statements made by a third party." *Neely v. Wilson,* 418 S.W.3d 52, 59 (Tex. 2013). Therefore, the *Neely* court ruled that Texas common law does not support "a substantial truth defense for accurately reporting third-party allegations." *Id.* at 64.

This is the second time in recent weeks InfoWars has falsely told this Court that it is entitled to the statute's protection when it knows it does not apply.[1] The statutory exception to *Neely* is limited to newspapers, periodicals, and broadcasters. InfoWars is not a newspaper, periodical, or broadcaster. First, InfoWars is obviously not a newspaper. Under Texas law, "'newspaper' means a publication that is printed on newsprint." *Reuters Am., Inc. v. Sharp,* 889 S.W.2d 646, 650 (Tex. App.—Austin 1994, writ denied), *citing* Tax Code § 151.319(f). Likewise, InfoWars is not a periodical. The term periodical "comprises magazines, trade publications, and scientific and academic journals with weekly, monthly, or quarterly circulation." *See* 58 Am. Jur. 2d Newspapers, etc. § 4, *citing Goguen ex rel. Estate of Goguen v. Textron, Inc*., 234 F.R.D. 13, 69 Fed. R. Evid. Serv. 726 (D. Mass. 2006). "The United States Postal Service uses a

[1] *See* Appellants' Brief in *InfoWars, LLC, et al. v. Fontaine,* No. 03-18-00614-CV.

similar definition of 'periodical' to determine mailing rates." *Goguen*, 234 F.R.D. at 18. InfoWars' video is not a periodical. Finally, InfoWars is not a broadcaster. Under the TCPA, a "broadcaster means an owner, licensee, or operator of a radio or television station or network of stations and the agents and employees of the owner, licensee, or operator." Tex. Civ. Prac. & Rem. Code Ann. § 73.004(b). InfoWars does not broadcast any signals over airwaves.

Since InfoWars cannot show it is one of the three specified entities described in the statute, the video is governed by the the common law framework as set forth in *Neely.* Under that framework, "the Texas Supreme Court has reaffirmed the 'well-settled legal principle that one is liable for republishing the defamatory statement of another.'" *Warner Bros. Entm't, Inc. v. Jones,* 538 S.W.3d 781, 810 (Tex. App.—Austin 2017, pet. filed), *quoting Neely*, 418 S.W.3d at 61.

B. The InfoWars video goes beyond allegation reporting.

In any case, InfoWars cannot be entitled to third-party allegation protection because the "defamatory statements at issue here went beyond mere 'allegation reporting.'" *Scripps NP Operating, LLC v. Carter,* 13-15-00506-CV, 2016 WL 7972100, at *13 (Tex. App.—Corpus Christi Dec. 21, 2016, pet. filed). First and foremost, InfoWars "did not consistently attribute the allegations to a third-party source." *Id.* at *13. Ms. Binkowski observed that "it

is notable that Mr. Shroyer only said the phrase 'Zero Hedge' one time in the entire segment. Mr. Shroyer did not consistently attribute the allegations to Zero Hedge." [CR 1676].

Most important is Mr. Shroyer's enthusiastic endorsement of the allegations. Although Mr. Shroyer's video noted "that the allegations had initially been made by [a third party], its 'gist or sting' was that the allegations were, in fact, true." *Scripps* at *13. Under those circumstances, the statements "were not merely reports of allegations." *Id.* A report of an allegation must be "a simple, accurate, fair, and brief restatement." *KBMT Operating Co., LLC v. Toledo,* 492 S.W.3d 710, 717 (Tex. 2016). Mr. Shroyer's video was none of those things, and it contained Mr. Shroyer's cruel accusation that Mr. Heslin was consciously lying about his son's death ("That's not something that you would just misspeak on.") [CR 1549].

In her affidavit, Ms. Binkowski reviewed the statements in the video and identified "several parts of the language used in the video which [she] found quite significant." [CR 1676]. Under Texas law, the character of these statements can provide "additional affirmative evidence from the text itself that suggests the defendant objectively intended or endorsed the defamatory inference." *Tatum,* 554 S.W.3d at 644 (Tex. 2018). Ms. Binkowski first explained

how an ordinary viewer would see Mr. Shroyer making his own accusations and citing his own evidence:

> Mr. Shroyer stated: "[Heslin] is claiming that he held his son and saw the bullet hole in his head. That is his claim. Now, according to a timeline of events and a coroner's testimony, that is not possible." A viewer of ordinary intelligence could hear this statement and conclude that Mr. Shroyer is making his own assertion. Zero Hedge is not mentioned. In fact, Mr. Shroyer's citation of "a timeline of events and a coroner's testimony" as the basis for his conclusion strongly suggests that InfoWars had examined the evidence itself. [CR 1676-77].

Ms. Binkowski also examined Mr. Shroyer's ambiguous use of the phrase "fact-checkers," and the ways that statement could be understood:

> This language is ambiguous in context. It can reasonably be interpreted in three ways. First, the "fact checkers" who purportedly examined the issue could work for InfoWars. Second, the "fact checkers" could be associated with Zero Hedge. Third, the "fact checkers" are some other unnamed source relied on by InfoWars.
>
> A viewer of ordinary intelligence could hear this statement and reasonably believe that InfoWars had confirmed the accuracy of the Zero Hedge report with its own "fact checkers." This interpretation is supported by the remainder of the segment in which Mr. Shroyer makes his own comments and shows footage assembled and edited by InfoWars. [CR 1676].

Ms. Binkowski also discussed how Mr. Shroyer signaled to the viewer that he was making his own allegations:

> Later in the InfoWars video, Mr. Shroyer asserted that there was a "contradiction in the narrative." This was clearly Mr. Shroyer's own conclusion.
>
> Mr. Shroyer also callously stated: "You would remember if you held your dead kid in your hands with a bullet hole. That's not something that you would just misspeak on." Not only is this statement sickening, but it further reinforces that Mr. Shroyer has taken his own position.
>
> Later in the video, when speaking about Mr. Heslin's statements to Megyn Kelly, Mr. Shroyer stated: "Here is an account from the coroner that does not corroborate with that narrative." Again, Zero Hedge was not mentioned or attributed. Mr. Shroyer was presenting his own assertion that Mr. Heslin's interview is contradicted by the coroner. However, this is false. Mr. Heslin's interview is not contradicted by the coroner. [CR 1677-78].

Finally, Mr. Binkowski explained how all the circumstances of the video shows that it went beyond allegation reporting:

> The June 26, 2017 InfoWars video was not merely a report on a third-party's allegations. Rather, InfoWars adopted the allegations of a dubious anonymous website and reasserted them as their own. InfoWars presented the allegations as true, and it made statements and played deceptive video edits which were meant to convince its viewers that Mr. Heslin's statements were not possible. [1682-83].

C. The InfoWars video did not accurately mirror the Zero Hedge blog post.

Even if InfoWars were entitled to the new statute's protections, the video was not an accurate report of the third-party statements. A publisher's "omission of facts may be actionable if it so distorts the viewers' perception that they receive a substantially false impression of the event." *Warner Bros.,* 538 S.W.3d at 810. Texas recognizes that "a plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way." *Dallas Morning News, Inc. v. Hall*, 524 S.W.3d 369, 382 (Tex. App.—Fort Worth 2017, pet. filed). In other words, a publication does not accurately report a third-party source when it omits a pertinent fact.

In this case, Ms. Binkowski notes that both Zero Hedge and Mr. Shroyer alleged "that Dr. Carver told the media that 'the parents of the victims weren't allowed to see their children's bodies.'" [CR 1684]. However, she explained one key difference:

> In the Zero Hedge blog post, the author later admits that "it's entirely possible that Mr. Heslin had access to his son after the shooting." Mr. Shroyer's video contains no such statements. [*Id*].

In the InfoWars' mythology, the parents were never allowed to see their children, and Mr. Shroyer uses the videos in his segment to make this point. As such, Appellee would still have a cause of action even under the new third-party statute because Mr. Shroyer's video "created a gist that cast [him] in a worse light than…the source of the allegations themselves." *Hall,* 524 S.W.3d at 382–83.

D. There is no evidence of a third-party.

Even if the new statute did apply to InfoWars, the statute does not protect the re-publication of dubious anonymous statements. In order to claim the defense, the article must "attribute the allegations to a third-party source." *Scripps* at *13. In her affidavit, Ms. Binkowski explains that the content posted on Zero Hedge does not point to any ascertainable third-party:

> Zero Hedge is anonymous blog. Zero Hedge has no named editor-in-chief, and its articles are submitted by anonymous authors. The publication has no listed address nor phone number. Its website is registered anonymously. [CR 1678].

Instead, InfoWars merely printed anonymous hearsay as its own defamation. InfoWars cannot name any individual whose statement it claims to have reported. For all we know, the anonymous author who submitted the story to Zero Hedge could be an InfoWars employee or agent, which is a legitimate possibility given the connections between InfoWars and Zero Hedge discussed

by Ms. Binkowski. [CR 1681-83]. Publishing anonymous accusations is not a defense; it is evidence of actual malice. *See, e.g., Bentley,* 94 S.W.3d at 596; *see also* 1 Law of Defamation § 3:62 (2d ed.) ("[R]eliance on an anonymous source… is admissible as evidence of actual malice."). InfoWars' conduct is no different than one of its reporters seeing bathroom graffiti stating, "Neil Heslin is a liar," and then republishing that allegation. Immunity for that conduct would create anarchy in defamation law.

E. InfoWars' allegation was not a matter of public concern.

Even if the new third-party allegation did apply InfoWars, it would require a showing that the video related to "a matter of public concern." A video which solely concerns whether Mr. Heslin held his child's body is not a matter of public concern. Rather, it was a calculated personal attack on Mr. Heslin in retaliation for his interview with Megyn Kelly. "Matter of public concern" is defined in Civil Practice and Remedies Code, specifically, Sec. 27.001, which reads: "An issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace." Here, accusing Mr. Heslin of lying about holding the body of his dead son does not amount to a matter of public concern. "Speech deals with matters of public concern when it can be *fairly* considered as relating to any matter of political, social, or other concern to the

community ... or when it is a subject of *legitimate* news interest; that is, a subject of general interest and of *value* and concern to the public..." *Snyder v. Phelps,* 562 U.S. 443, 453, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). Mr. Shroyer's video was none of these things. The third-party allegation defense is inapplicable for this reason and the many others cited above.

VII. Appellee is not a Limited Purpose Public Figure for the Topic of the InfoWars Video.

InfoWars contends that the Appellee is a public figure for the purposes of the controversy over InfoWars' hoax allegations, or alternatively, that Appellee is a public figure due to his advocacy for gun regulation. In either case, InfoWars' argument fails for the reasons set forth below.

A. The controversy over Alex Jones's statements about the Sandy Hook parents.

InfoWars first identifies the controversy as the public dismay over Mr. Jones' statements about Sandy Hook and his attacks on the credibility of the parents. [Appellants' Br. 40]. Megyn Kelly's exposé on Jones addressed this controversy head-on. Ms. Kelly asked Mr. Heslin to grant an interview regarding InfoWars' years of lies about the death of his son and the twenty-five other victims of the tragedy. InfoWars claims that Mr. Heslin is a public figure because he "volunteered to be interviewed on camera and volunteered to provide his thoughts on Jones' opinions." [CR 104].

To the extent Appellee has any notoriety in the controversy over whether Sandy Hook is a hoax, it is only because Mr. Jones inflicted that notoriety with his incessant attacks and accusations that the victims were not real. "A person does not become a public figure merely because he is 'discussed' repeatedly by a media defendant or because his actions become a matter of controversy as a result of the media defendant's actions." *Klentzman v. Brady*, 312 S.W.3d 886, 905 (Tex. App.—Houston [1st Dist.] 2009, no pet.), *quoting Hutchinson v. Proxmire,* 443 U.S. 111, 135 (1979) (noting that "[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.") Under well-settled Texas law, a defendants' conduct "cannot be what brought the plaintiff into the public sphere." *Neely*, 418 S.W.3d at 71 (Tex. 2013).

Mr. Heslin agreed to appear on camera after four years of lies to give defensive statements, and defensive statements do not transform a plaintiff into a public figure. *See* Defamation: A Lawyer's Guide § 5:9. Vortex or limited purpose public figure – The preexistence requirement and rejection of media "bootstrapping." (Collecting cases refusing to find "that purely defensive truthful statements constitute a purposeful injection."); *see also, e.g., Hutchinson,* 443 U.S. at 135 (Plaintiff must be "a public figure prior to the controversy engendered by the [defendant's conduct]."); *Lohrenz v. Donnelly*,

350 F.3d 1272, 1281-82 (D.C. Cir. 2003) (plaintiff's "attempts to defend herself through the media against allegedly defamatory statements" did not make her a public figure). As Mr. Heslin explained in his affidavit:

> I never sought to participate in any public debate over whether the events at Sandy Hook were staged. Nor did I seek to participate in any public debate over whether my son died.
>
> Over the years, I remained silent as Mr. Jones continued to make disgusting false claims about Sandy Hook, telling his viewers that the children were fake and that the parents were liars and evil conspirators.
>
> In 2017, Megyn Kelly was in the process of producing a profile on Mr. Jones when she asked me for an interview. Though I was very conflicted as to whether to grant an interview, I agreed to speak on camera only to help set the record straight about the lies told by Mr. Jones about Sandy Hook, specifically that the event was staged and involved actors.
>
> I gave comments to Ms. Kelly stating the reality: The shooting happened. I stated that I buried my son, that I held my son's body, and that I saw a bullet hole through his head.
>
> I made these statements not to invite debate, but to clear my name and protect the memory of my son. [CR 1711].

"An individual should not risk being branded with an unfavorable status determination merely because he defends himself publicly against accusations, especially those of a heinous character." *Lluberes v. Uncommon Productions,*

LLC, 663 F.3d 6, 19 (1st Cir. 2011). Court have found "no good reason why someone dragged into a controversy should be able to speak publicly only at the expense of foregoing a private person's protection from defamation." *Foretich v. Capital Cities/ABC, Inc.,* 37 F.3d 1541, 1564 (4th Cir. 1994). The "actual-malice standard here would serve only to muzzle persons who stand falsely accused of heinous acts and to undermine the very freedom of speech in whose name the extension is demanded." *Id.* In this case, granting Ms. Kelly's interview request was a reasonable and proportional response to four years of vile falsehoods on a national scale.

B. Controversy over gun regulation.

Limited purpose public figures "are only public figures for a limited range of issues surrounding a particular public controversy." *WFAA-TV, Inc. v. McLemore,* 978 S.W.2d 568, 571 (Tex. 1998). Here, InfoWars contends that Mr. Heslin is a public figure because of his advocacy for gun regulation in the wake of the Sandy Hook tragedy. [Appellants' Br. 40]. While Mr. Heslin has made public appearances in support of gun regulation, his participation is trivial to the overall national debate, which is a broad controversy with countless participants. As explained in the D.C. Circuit's oft-cited *Waldbaum* opinion, a broad controversy makes it less likely than minor actor is public figure:

> A broad controversy will have more participants, but few can have the necessary impact. Indeed, a narrow controversy may be a phase of another, broader one, and a person playing a major role in the "subcontroversy" may have little influence on the larger questions or on other subcontroversies. In such an instance, the plaintiff would be a public figure if the defamation pertains to the subcontroversy in which he is involved but would remain a private person for the overall controversy and its other phases.

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980).

Mr. Heslin did participate in some advocacy on gun regulation, but as he stated in his affidavit, his participation was limited:

> Following the tragedy, I was asked to appear before the U.S. Senate and Connecticut legislators to give testimony about my experience and my opinion on school safety.
>
> I never sought to be any kind of public figure. I merely recognized that I was involved in a matter that had attracted public attention. It was not my intention to give up my privacy or surrender my interest in the protection of my own name in all aspects of my life.
>
> I had some tangential involvement in speaking out on sensible gun regulations, but I do not consider myself an activist. I have not been a vigorous participant or a noteworthy part of that on-going debate. [CR 1710].

In any case, the scope or significance of Mr. Heslin's civic involvement in the gun regulation debate is irrelevant in this case. The InfoWars video had absolutely nothing to do with guns and nothing to do with Mr. Heslin's gun-

related advocacy. Neither guns nor gun regulation are ever mentioned or implicated anywhere in Mr. Shroyer's video.

A plaintiff's status depends on "an individual's participation in the particular controversy giving rise to the defamation." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 352 (1974). Therefore, it is required that "the alleged defamation is germane to the plaintiff's participation in the controversy." *McLemore*, 978 S.W.2d at 573. Here, the defamation has nothing to do with Mr. Heslin's gun advocacy. The hypothetical viewer would not understand from Mr. Shroyer's video that Mr. Heslin ever participated in the gun issue or that gun laws are implicated in any way. The defamation clearly arose from the "Alex Jones controversy" and not from Mr. Heslin's 2013 gun advocacy.

In this case, InfoWars defines the controversy even more broadly, asserting an unbounded "controversy" concerning the "the government and mainstream media's use of national tragedies to push political agendas." [Appellants' Br. 40]. But that is not a "controversy" as the term is used in First Amendment jurisprudence. Under Texas law, a "general concern or interest will not suffice," and a public controversy is more than simply a "controversy of interest to the public." *Klentzman*, 312 S.W.3d at 905 (Tex. App. Houston [1 Dist.] 2009), *quoting Firestone*, 424 U.S. at 454 (internal citation omitted). The

Court must instead determine "whether persons actually were discussing some *specific question*." *Id.* (emphasis added).

At most, InfoWars identifies a potential trait of the media and/or government, *i.e.*, that they use current events to drive their agendas. That is not a "question" that is capable of being resolved such that the public could "feel the impact of its resolution." *McLemore*, 978 S.W.2d at 573. The notion that there must be an issue susceptible of resolution is central to the *Gertz* limited purpose public figure framework, which defined limited purpose public figures as those who "thrust themselves into the vortex of a [public controversy] . . . *in an attempt to influence its outcome*." *Gertz*, 418 U.S. at 345 (emphasis added). One cannot "influence" the "outcome" of a matter that does not call for some definite resolution.

Even if the Court were to accept InfoWars' assertion that there is a public controversy (in the *Gertz* meaning) about the media and/or government's use of tragedies to push agendas, InfoWars has not demonstrated that Plaintiff sought any role in such a controversy, much less the "central" role required to characterize him as a public figure. InfoWars has identified zero instances where Plaintiff injected himself into any discussion about whether the government or media were using tragedies to push an agenda.

The extremely narrow standards of the "limited purpose" for public figures in Texas is illustrated in the Corpus Christi court's decision in *Scripps*. There, a president of a chamber of commerce was a public figure for a city tax agreement because of his strenuous advocacy for that agreement, but he was not a public figure for his own job performance and financial stewardship of the chamber, which arguably influenced and motivated his advocacy. The court analyzed the issue as follows:

> We must determine whether the alleged defamation was germane to Carter's participation in the controversy. In his petition, Carter alleged that Scripps defamed him by publishing written statements concerning his job performance, specifically, his financial stewardship of the financial affairs of the Chamber of Commerce…Scripps acknowledges that the "articles at issue concern Carter's job performance and financial stewardship of the Chamber." However, they argue that by speaking at the city council meeting, Carter "assumed the risk that the press, in covering the controversy, [would] examine" him with a critical eye. We do not agree that Carter's job performance and financial stewardship of the Chamber of Commerce is germane to [the challenged statement regarding] the financing agreement."

Scripps, at *5; *see also Lohrenz,* 350 F.3d at 1279 (Plaintiff is "a public figure if the defamation pertains to the subcontroversy in which he is involved but would remain a private person for the overall controversy and its other phases."). These decisions are consistent with the maxim that "an individual

should not be deemed a public personality for all aspects of his life." *San Antonio Exp. News v. Dracos,* 922 S.W.2d 242, 251 (Tex. App.—San Antonio 1996, no writ). Therefore, the court must ask "whether the plaintiff is a public figure with respect to the topic of the publication." *Fitzgerald v. Penthouse Intern., Ltd.,* 691 F.2d 666, 669 (4th Cir. 1982). In this case, the publication contains no content whatsoever relating to gun regulation or Mr. Heslin's civic activities. In other words, it is immaterial whether Mr. Heslin is a public figure for the gun regulation debate. He is not a public figure for whether he held his child's body, which is the only topic of the video. The video is germane to only one controversy -- the controversy over Mr. Jones' years of accusations about the Sandy Hook victims.

Finally, a publication cannot be germane to a plaintiff's public participation if the publication did not arise because of that plaintiff. Here, InfoWars argued that its video did not intend to refer to Appellee as an "ascertainable person," and that its video was instead "directed at NBC and Kelly," and "directed at the government and MSM." [CR 96]. In other words, InfoWars admitted that the video arose *not* due to Mr. Heslin's civic participation, but that it arose from its criticisms of Megyn Kelly, NBC, the government, and what it has termed "the MSM." InfoWars insisted that "the

statements were not accusatory of the Plaintiff." Therefore, the publication could not have arisen from Mr. Heslin or his public acts. [*Id*].

This principle is well illustrated by a case from the Eastland court involving Paramount Pictures. Paramount aired commentary which it did not intend to direct at Allied Marketing, but it nonetheless included content which could be understood by audiences as defamatory to Allied. Because Paramount did not intend to target Allied, "Paramount could not establish that it was germane to Allied's participation." *Allied Mktg. Group, Inc.,* 111 S.W.3d at 177. The court noted that Paramount's intent was the only relevant issue, because "the limited purpose public figure test does not take into consideration the understanding of the publication's viewers." *Id.* at 178. Here, InfoWars asserts that it directed the broadcast at the media, and that its defamation of Mr. Heslin was coincidental, as in *Allied*. As such, its defamation did not arise from Mr. Heslin's public acts.

VIII. InfoWars Acted with Actual Malice.

Appellees' status ultimately makes no difference because there is clear evidence of actual malice. Malice exists in defamation when a publisher shows a "reckless disregard for the falsity of a statement." *Bentley,* 94 S.W.3d at 591. A showing of actual malice can be satisfied when there is *prima facie* circumstantial evidence that a defendant would have "entertained serious

doubts as to the truth of his publication." *Warner Bros.,* 538 S.W.3d at 805. A plaintiff may offer circumstantial evidence suggesting that a defendant made statements which he "knew or strongly suspected could present, as a whole, a false and defamatory impression of events." *Turner v. KTRK TV, Inc.*, 38 S.W.3d 103, 120-121 (Tex. 2000). Here, there are several reasons to find that InfoWars acted with reckless disregard for the truth.

A. The accusation was inherently improbable.

When assessing actual malice, the court should "begin by noting the gravity of the accusations made against [plaintiff]." *Warner Bros.,* 538 S.W.3d at 806. As Mr. Zipp stated, "serious claims require serious evidence," and accuracy becomes "more important in proportion to the seriousness of the facts asserted." [CR 1526; 1540]. Justice Bourland echoed that sentiment last year, noting "[c]harges as serious as the ones leveled against [plaintiff] in this article deserve a correspondingly high standard of investigation." *Id.* at 806. Mr. Zipp found that "given the seriousness of the accusations, Mr. Shroyer acted recklessly." [CR 1540].

Ms. Binkowski's affidavit details how "[t]he allegation made by Mr. Shroyer was outlandish, inherently improbable, and obviously dubious." [CR 1683]. Malice is shown when the circumstances were "so improbable that only a reckless publisher would have made the mistake." *Freedom Newspapers of*

Tex. v. Cantu, 168 S.W.3d 847, 855 (Tex. 2005). "Inherently improbable assertions and statements made on information that is obviously dubious may show actual malice." *See* 50 Tex. Jur. 3d Libel and Slander § 133.

B. InfoWars used dubious third-party sources.

In a case involving allegations originating with a third-party source, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Warner Bros.,* 538 S.W.3d at 806, *citing Harte-Hanks*, 491 U.S. at 688. Here, both of the sources relied on by InfoWars are extraordinarily unreliable.

1. Zero Hedge

Ms. Binkowski's affidavit provided the trial court with an understanding of Zero Hedge. Ms. Binkowski stated that she has "personal professional knowledge about the website 'Zero Hedge,'" and that "researchers at Snopes continuously debunked claims made in Zero Hedge articles." [CR 1678]. According to Ms. Binkowski, "[n]early everything about Zero Hedge calls its reliability into question." [*Id*]. Ms. Binkowski explained the history of this anonymous website:

> Zero Hedge began in 2009 as an anonymous blog focusing on Wall Street and investment rumors. Even from the beginning, its content consisted of unsourced hearsay and conspiracy theories about Wall Street. However, over the past several years of my work, I

> have witnessed the website become increasingly flagrant as a producer of fake information and malicious accusations. Zero Hedge's history of publishing egregiously fake information had been well-documented since at least the time of the 2016 presidential election. [CR 1679].

Ms. Binkowski also included "a small selection of recent erroneous reporting and intentional agitation by Zero Hedge" in which she detailed sixteen instances of hoaxes and demonstrably fake news items published by Zero Hedge which had been debunked by the Snopes staff over the past two years. [CR 1679-82]. In this case, Ms. Binkowski noted that "the article in question purports to be authored by an anonymous individual(s) using the name ZeroPointNow," who is a "contributor to an anonymous website called 'iBankCoin.com,' a cryptocurrency website which likewise traffics fake news items." [CR 1678].

Ms. Binkowski testified that InfoWars was fully aware of Zero Hedge's past content. In fact, InfoWars had frequently published materials written by Zero Hedge on its own website. Ms. Binkowski "reviewed seven articles on InfoWars.com which were published under the author by-line 'Zero Hedge' in just the two weeks leading up to Mr. Shroyer's June 26, 2017 video." [CR 1681]. Ms. Binkowski stated that she has "seen InfoWars and Zero Hedge, along with several other fake news websites, forge a cooperative relationship in which

they publish, promote and endorse each other's content." [CR 1682]. According to Ms. Binkowski, "this pattern of amplification and endorsement is a key part of how fake news spreads." [*Id*].

InfoWars claims that "Zero Hedge is a respected website," and that it has been "favorably rated" by *Columbia Journalism Review*, *New York Magazine*, *The New York Times*, and *Time.* [Appellants' Br. 2]. This is not true. InfoWars first cites a 2009 article from the *Columbia Journalism Review*, and it claims the article reported that Zero Hedge's "news accounts have been pretty straightforward." InfoWars misread the article. The comment was made about news accounts concerning Goldman Sachs contained in a Bloomberg News story. [CR 1907].

> So far, news accounts have been pretty straightforward (http://www.bloomberg.com/apps/news?pid=20601087&sid=a6ItnK32Cl6Y).

The *Columbia Journalism Review* article is actually critical of Zero Hedge. Even ten years ago, the author wrote that his article was his "way of saying I don't know whether it's okay to rely on Zero Hedge's facts." [*Id*]. InfoWars next cited a 2009 article from *New York Magazine* which makes no statements about Zero Hedge's reliability but notes the blog was a "zealous believer in a sweeping conspiracy at the helm of U.S. policy." [CR 1909]. InfoWars also cited a 2011

article from the *New York Times*, which called Zero Hedge a "controversial financial blog" which "does not give readers a way to readily reach its writers," but no made no statements about its reliability. [CR 1911]. InfoWars also cited a *Business Time* article from 2009 which called Zero Hedge's information "half-baked hooey." [CR 1915]. The article also noted "the blog didn't get any traction" until Zero Hedge "began pumping up the paranoia." [*Id*]. Finally, InfoWars cited an undated article from *Time* which lists websites that offered "useful financial advice" as well as websites that "were just fun." [CR 1195]. In the entry for Zero Hedge, the author refers to the website as "a morning zoo," and he compares it to *The X-Files,* a TV show from the 1990s about outlandish government conspiracies and aliens. [CR 1196]. The author states, "I can't read it for long," and "I don't read Zero Hedge regularly," describing the website as "too conspiratorial." [*Id*]. None of these articles show any indicia of Zero Hedge's reliability, nor can they rebut the testimony of Ms. Binkowski, which demonstrates InfoWars knew of Zero Hedge's unreliable content.

Ms. Binkowski concluded that "[n]o competent journalist would republish allegations from an anonymous message on Zero Hedge without corroborating the accuracy of the allegations. However, in this case, it is clear that InfoWars not only understood Zero Hedge's reputation, but it was actively

collaborating with Zero Hedge to spread fake news and dangerous conspiracy claims." [CR 1683].

2. Jim Fetzer

The anonymous blog post on Zero Hedge cites an individual named Jim Fetzer to support the accusation that Mr. Heslin was lying. Mr. Zipp provides context on Mr. Fetzer's background:

> In its Motion to Dismiss, InfoWars described Mr. Fetzer with an air of respectability, referring to him as "Professor Emeritus of the University of Minnesota." In truth, the retired professor has long been understood to be an unhinged crank. I do not use these terms lightly. Mr. Fetzer, author of the disturbingly titled self-published book "Nobody Died at Sandy Hook" has spent years spreading ridiculous and bizarre claims about the event. For example, Mr. Fetzer is convinced that Sandy Hook parent Leonard Pozner is actually a different man named Reuben Vabner…Mr. Fetzer's bizarre writings feature notably anti-Semitic rants about Mr. Pozner, who he insists is part of some international Jewish conspiracy…Mr. Fetzer is obsessed with the notion of faked identifies, and he makes similar accusations about the shooting victims, posting photo comparisons which he claims prove that the photos of children are actually adults. [CR 1540-41].

Mr. Zipp notes that Mr. Fetzer even told his readers "that he has located a photograph containing the female shooting victims, who are now allegedly adolescents." [CR 1542]. Shown below is Mr. Fetzer's purported photo of the "crisis actors" reunion:

According to Mr. Zipp, "Mr. Fetzer has claimed, with no evidence, that the death certificates for shooting victims have been faked and that a shooting victim's gravestone was actually a computer-generated graphic." [CR 1543]. In short, Mr. Fetzer is well known for being an outrageous crank and grifter, selling books and collecting donations from confused outcasts, all of which he has based on either malicious lies or his own preposterous delusions. Mr. Zipp concluded that "no rational journalist would ever rely on Mr. Fetzer as a source for anything, especially an allegation as improbable and serious as accusing a parent of lying about holding their dead child. InfoWars' uncritical endorsement of accusations being promoted by Mr. Fetzer demonstrates its reckless and deceptive conduct." [*Id*].

C. InfoWars acted deceptively.

This is not merely a case where Mr. Shroyer and InfoWars recklessly disregarded the truth. Rather, the source material and the underlying facts show that Mr. Shroyer was acting deceptively. As Ms. Binkowski noted, "Mr. Shroyer used contemporary press coverage in a misleading and dishonest way, with the clear goal of misleading his viewers." [CR 1683].

1. Interview with Dr. Carver

Ms. Binkowski viewed the full video of Dr. Carver's interview, which is publicly available online. In the interview, "there is additional footage from the interview -- not shown by InfoWars -- which directly contradicts the assertion made by Mr. Shroyer." [*Id*]. Ms. Binkowski described the relevant portion omitted by InfoWars:

> At 11:03 in the video, a reporter asks Dr. Carver if there was a protocol as to the order he did the medical examinations. Dr. Carver states that it was his "goal was to get the kids out and available to the funeral directors first, just for, well, obvious reasons."
>
> At 13:27 in the video, a reporter asks Dr. Carver if "all the children's bodies have been returned to the parents or mortuaries." Dr. Carver responds, "I don't know. The mortuaries have all been called." The reporter asks, "But they're ready to be released at this time?" Dr. Carver responds, "As of 1:30, the paperwork has been done. The usual drill is that the funeral homes call us, and as soon as the paperwork is done, we call

> them back. That process was completed for the children at 1:30 today." [*Id*].

Despite these answers given in Dr. Carver's interview, InfoWars used an edited portion of his interview where he stated that "we did not bring the bodies and the families into contact," and that "we felt it would be best to do it this way." [CR 2425]. InfoWars used this video clip to suggest that the parents were not allowed to see their children before burial. However, it is clear in context that Dr. Carver was only referring to the initial identification process. Given the content of Dr. Carver's interview, Mr. Zipp agreed that InfoWars "intentionally distorted the evidence in a malicious way to attack and retaliate against Mr. Heslin." [CR 1540].

2. Interview with Chris and Lynn McDonnel.

Ms. Binkowsi also reviewed a transcript of Anderson Cooper's interview with Sandy Hook parents Chris and Lynn McDonnel. InfoWars used a clip of the interview "to suggest that the McDonnel's were not allowed access to their child prior to burial." [CR 1683-84]. However, InfoWars used an edited clip to omit statements by the parents showing they were allowed to see their child. Mr. Binkowski explained that:

> The use of the clip in this way was dishonest. The transcript shows that the InfoWars video clip cut off the end of the Mrs. McDonnel's answer. She stated, "And I had questioned maybe wanting to see her, *but*

> *then I thought, she was just so, so beautiful, and she wouldn't want us to remember her looking any different than her perfect hair bow on the side of her beautiful long blond hair*."
>
> In the interview, Mr. McDonnel stated, "But when we left the room, it was certainly so hard to leave her because that would be the last time that we would be able to be with her." It is clear that the parents had to the opportunity to see their child's body, yet they chose not to do so. [CR 1684].

Ms. Binkowski concluded "that InfoWars and Mr. Shroyer used a deceptively edited copy of the interview to give the appearance that the parents were not allowed to see their daughter." [*Id*]. This clip was used to accuse Mr. Heslin of lying about holding his son. In the July 20, 2017 video in which Mr. Jones republished Mr. Shroyer's video, Jones stated, "you've got CNN and MSNBC both with different groups of parents and the coroner saying we weren't allowed to see our kids basically ever." [CR 2426].

InfoWars' actions were malicious because "[t]he only way a journalist could support such a conclusion is by intentionally distorting the evidence and Mr. Heslin's statements." [CR 1684]. According to Ms. Binkowski, "[t]he source material demonstrates that is exactly what occurred in this case." [*Id*]. Mr. Zipp agreed that "Mr. Shroyer was only able to support his bogus accusations by using deceptively edited footage." [CR 1540]. Mr. Zipp concluded "[t]hese

actions were aimed at manufacturing a controversy where none existed." [CR 1538].

D. InfoWars' prior conduct shows actual malice.

As Mr. Zipp noted, "InfoWars has made wild claims about the Sandy Hook massacre from the beginning," and it has "continually repeated these falsehoods over the course of five years." [CR 1543]. According to Mr. Zipp, "[c]ountless individuals and media organizations have thoroughly debunked each of InfoWars' claims over the years. Nonetheless, InfoWars has persisted in this malicious campaign." [*Id*].

Defendants' five-year campaign of lies and harassment of the Sandy Hook victims shows actual malice because "evidence of extraneous conduct is admissible, as prior bad act evidence, to show malice, in a defamation suit." *See* 1 Tex. Prac. Guide Civil Trial § 6:131, Character evidence—Evidence of other wrongs or acts—Intent/Malice. "[A]ctual malice may be inferred from the relation of the parties, the circumstances attending the publication, the terms of the publication itself, and from the defendant's words or acts before, at, or after the time of the communication." *Warner Bros.,* 538 S.W.3d at 805, *citing Dolcefino v. Turner*, 987 S.W.2d 100, 111-12 (Tex. App.—Houston [14th Dist.] 1998), *aff'd sub nom. Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000). Under Texas law, InfoWars' five-year campaign of lies against the Sandy

Hook families in the face of irrefutable affirmative evidence is relevant to establishing the malicious nature of the statements.

Mr. Zipp's affidavit provides a lengthy yet only partial history of InfoWars' constant harassment of these parents. [CR 1531-37]. The attack on Mr. Heslin was meant to further these hoax allegations. In the July 20, 2017 video, when Mr. Jones chose to republish Mr. Shroyer's accusations, Jones launched into a rant listing some of the reckless lies he had spread about Sandy Hook:

> Is there a blue screen when Anderson Cooper's face disappearing? Are there kids going in circles in the video shots? Did they hold back the helicopters? Did they have porta-pottys there in an hour and a half? Did they run it like a big PR operation? Do they get all these conflicting stories in the media? Absolutely. [CR 401].

Appellee also submitted a copy of Mr. Zipp's affidavit from an additional pending lawsuit involving Sandy Hook parents. That affidavit contains even more examples of Mr. Jones' five-year harassment of the Sandy Hook victims in which he has recklessly disregarded the truth in pursuit of his malicious obsession. [CR 1647-73]. In over twenty videos in the past few years, Mr. Jones has obsessively pursued his allegations about Sandy Hook. Just two months before Mr. Shroyer's statements, Mr. Jones published an hour-long video

entitled "Sandy Hook Vampires Exposed" in which he made a variety of reckless claims, such as falsely asserting that:

- A parent faked an interview in front of a blue-screen. [CR 1650].
- The school was actually closed until that year. [CR 1651]
- A video showed the school was rotted and abandoned. [*Id*].
- Authorities found men in the woods behind the school dressed up in SWAT gear. [CR 1658].

Mr. Jones has told his audience that "[t]he whole thing is a giant hoax," and that "it took [him] about a year with Sandy Hook to come to grips with the fact that the whole thing was fake." [CR 1663]. Mr. Jones said "[he] did deep research; and my gosh, it just pretty much didn't happen," and that Sandy Hook is "synthetic" and "completely fake with actors." [*Id*]. Mr. Jones said:

> I couldn't believe it at first. I knew they had actors there, clearly, but I thought they killed some real kids. And it just shows how bold they are that they clearly used actors. [*Id*].

As Ms. Binkowski stated, it is clear "that Mr. Shroyer's video segment was part of InfoWars' ongoing effort to support and justify its vile five-year lie that the Sandy Hook shooting was staged." [CR 1684]. InfoWars' accusation was also based on ill will. When Mr. Heslin had the courage to defend himself and his

community against these lies, InfoWars targeted him with a cruel and dishonest accusation, all to perpetuate their insane allegations. "The supreme court also noted in *Bentley* that, although a defendant's ill will toward a plaintiff does not equate to actual malice, such ill will 'may suggest actual malice.'" *Campbell*, 471 S.W.3d at 631.

E. InfoWars drives profits by recklessly stating that national tragedies are fake.

In his affidavit, Fred Zipp discussed how InfoWars built a strong brand identity around news stories claiming that national tragedies are actually "false flags" conducted by a shadowy cabal for sinister political purposes. Mr. Zipp noted that "Mr. Jones' rise to notoriety coincided with his assertions that the 9/11 terror attacks were orchestrated by the U.S. government," and "[h]is current promotional materials boast that 'Alex Jones is considered by many to be the grandfather of what has come to be known as the 9/11 Truth Movement.'" [CR 1543]. Mr. Zipp described InfoWars reckless history of telling its audience that national tragedies are fake:

> Regarding the shooting at Columbine High School, Jones told his audience, "Columbine, we know was a false flag. I'd say 100% false flag." Jones claimed that Columbine "had globalist operations written all over it." Regarding the Oklahoma City bombing, Jones said the bombing was a "false flag" and that "we've never had one so open and shut." He added that convicted

> bomber Timothy McVeigh "was a patsy, that was a staged event."
>
> Mere hours after James Holmes killed twelve people in a movie theater in Aurora, CO, Jones told his audience that there was a "100 percent chance" the shooting was a "false flag, mind-control event." After the shooting of Rep. Gabrielle Giffords, Jones stated: "The whole thing stinks to high heaven." Mr. Jones asserted that the Giffords shooting was "a staged mind-control operation."
>
> An April 18, 2013 headline on the InfoWars website read "Proof Boston Marathon Bombing Is False Flag Cover-Up." A week later, Mr. Jones stated on his broadcast, "I have never seen a false flag, provocateured, staged event by a government come apart faster than it is right now." Jones said that "patsies were set up" after being recruited by "globalist intelligence agencies." Jones claimed that Dzhokhar Tsarnaev, who was convicted of the Boston Marathon bombing, "was totally set up, ladies and gentlemen, to sell the police state," and that his brother worked for the CIA.
>
> Mr. Jones made similar accusations about the Douglas High School shooting in Parkland, Florida, claiming a 90% probability that it was a false flag. [CR 1544].

Mr. Zipp concluded that "a major element of the InfoWars brand is built on his allegations that major national tragedies are actually the result of orchestrated government actions." [CR 1545]. InfoWars' lack of reliability in this area is further supported by the affidavit of John Clayton, who discussed how he stopped working with Mr. Jones because "it became apparent that he

had made the conscious decision not to care about accuracy," and Mr. Jones "made it clear that his goal was to produce views on InfoWars content." [CR 1722]. In light of all of these facts, Mr. Zipp found "that InfoWars' pattern of predictably asserting that events are 'false flags,' sometimes within hours of the event, is circumstantial evidence that InfoWars recklessly disregarded whether [Shroyer's] broadcast was true in this case." [CR 1545].

IX. InfoWars' 2017 Statements Caused Damages to Appellee.

InfoWars' act of retaliation against Mr. Heslin caused him damages, including severe mental anguish, medical expenses, and other pecuniary loss. These damages are best explained by Mr. Heslin in his affidavit:

> Mr. Jones' prior videos had deeply disturbed me, but this 2017 InfoWars video was far worse.
>
> This broadcast was the first time that InfoWars had featured me by name. In the past, when InfoWars discussed other specific parents, they had become subject to terrible harassment. For example, I was aware of the case of Lucy Richards, an InfoWars fan who was arrested and sentenced to federal prison for death threats against Sandy Hook parent Leonard Pozner. I was also aware of threats and harassment being directed at other parents.
>
> I was also aware that some conspiracy fanatics online had become convinced I was a "crisis actor." There is even an insane theory that I am a fireman who supposedly died on 9/11. Upon seeing Mr. Shroyer's video, I became intensely alarmed that his lie would embolden these dangerous people.

> When I learned about Mr. Shroyer's video and InfoWars' other 2017 statements, I knew that my safety and the safety of my family had been placed at risk. This fear dominated my thoughts.
>
> I have suffered a high degree of psychological stress and mental pain due to InfoWars using me and my child to revive the Sandy Hook hoax conspiracy in 2017. I had hoped that this ugly lie would go away, but now Mr. Jones had singled me out in his campaign of harassment, along with the memory of my son. This realization has caused a severe disruption to my daily life.
>
> I find that I can think of little else. I have experienced terrible bouts of insomnia, and periods in which I am filled with nothing but outrage, and I find that I am unable to do anything productive. Other times, I am filled with grief knowing that InfoWars has ensured that its sick lie continues, and I am dismayed that my last moments with my son have become a part of that. I decided to return to grief counselling to help address these issues, but I feel that I have been changed in a way that can never be fixed. [CR 1712].

In terms of pecuniary loss, Mr. Heslin has incurred numerous expenses which are detailed in his affidavit. These include expenses for counselling which "has been aimed at helping [him] cope with becoming a featured part of the Sandy Hook hoax claims." [*Id*]. These expenses also include a privacy protection service and online security plan because he was worried "conspiracy fanatics may use identify theft techniques to gain access to [his] personal details." [*Id*]. Finally, Mr. Heslin incurred expenses for home security

monitoring products, which he purchased "due to the fear that InfoWars' false statements would cause individuals to confront [his] family." [CR 1713].

These fears were well-founded, particularly since Mr. Heslin was aware that another parent who had been featured on InfoWars had been stalked by an InfoWars follower who imprisoned for making death threats. [CR 1712]. InfoWars claims that "other circumstances impacted his mental state," [Br. 43] implying that his child's death in 2012 means InfoWars is not capable of damaging him by defamation in 2017. InfoWars argues that Sandy Hook was so devastating that it cannot be distinguished from the terror and outrage described by Mr. Heslin upon learning five years later that he had been specifically targeted by Jones' ceaseless harassment campaign. Yet as Mr. Heslin makes clear in his affidavit, this experience was an entirely new form of distress.

Finally, InfoWars argues that Mr. Heslin cannot prove he suffered damages because he appeared on national television in two interviews to denounce Shroyer's video as a lie, and that portions of the video were played during that criticism. Yet Mr. Heslin is entitled to defend himself from the accusations made in the video and potentially mitigate his own reputational loss. That act does not eliminate the existence of his damages.

X. InfoWars Cannot Rely on the Fair Comment Privilege.

InfoWars' frivolously argues that its video is protected by the fair comment privilege under Tex. Civ. Prac. & Rem. Code §73.002. "This privilege grants legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." 50 Tex. Jur. 3d Libel and Slander § 76, *citing Hearst Corp. v. Skeen*, 130 S.W.3d 910 (Tex. App. Fort Worth 2004), *judgment rev'd on other grounds*, 159 S.W.3d 633 (Tex. 2005). "The imputation of a corrupt or dishonorable motive in connection with established facts is itself to be classified as a statement of fact and as such does not fall within the defense of fair comment." *Id*. Therefore, the defense cannot apply here because "a false statement of fact…even if made in a discussion of matters of public concern, is not privileged as fair comment." *Id.*

The Texas Supreme Court has said "if a comment is based upon a substantially false statement of fact the defendant asserts or conveys as true, the comment is not protected by the fair comment privilege." *D Magazine Partners, L.P.,* 529 S.W.3d at 441. Here, where Mr. Shroyer endorsed the substantially false statements as true, his statements are not fair comment, even if they could be considered a matter of "legitimate public interest."

XI. There is *Prima Facie* Evidence of InfoWars, LLC's Liability.

There is no question that three of the named Appellants are potentially liable to Appellee. The parties do not dispute that Owen Shroyer, a reporter for Free Speech Systems, LLC, made his accusations while hosting The Alex Jones Show, in a video that was published on the InfoWars website. [CR 8]. The parties do not dispute that Alex Jones chose to republish Mr. Shroyer's statements on his show soon thereafter. Appellants only dispute the involvement of InfoWars, LLC.

However, Appellee produced *prima facie* evidence that InfoWars, LLC operates the InfoWars.com website. Appellee provided the "Terms of Use & Privacy Policy" found on the InfoWars website. [CR 1725]. This document identifies InfoWars, LLC as the administrator of the website [CR 1729], and the text informs users of agreements they have made "by using Infowars.com." [CR 1744]. Indeed, the document states that InfoWars, LLC administers every "Uniform Resource Identifier we use to provide our Products and Services." [CR 1729]. Appellants counter with an affidavit disclaiming any involvement by InfoWars, LLC.

Last year in *Warner Bros.*, this Court discussed how to resolve this exact conflict. Just as here, the plaintiff presented evidence of the defendants' "Terms of Use" and "Privacy Policy" webpages as they existed "at the time of the motion

to dismiss." *Warner Bros.,* 538 S.W.3d at 801–02. These various webpages identified the named defendants as operating the website. The court noted that the documents "establish a *prima facie* case." *Id.* at 802. However, the defendants filed an affidavit in which their corporate officer "disclaimed responsibility for publication by three of the six defendants." *Id.*

The *Warner Bros*. court noted that the "affidavit is the testimony of an interested witness," which is "contradicted by the statements on the website." *Id.* The court also noted that the defendants' affidavit consisted of "bare, baseless opinions" and "conclusory testimony." *Id.* The court ruled that the "inconsistency between the website's public disclosures and [defendant's] interested testimony precludes us from viewing his testimony as conclusive proof that TMZ Productions, Inc. did not publish the article." *Id.* at 803.

In this case, Appellee produced the same evidence, and InfoWars produced the same conclusory affidavit. With respect to this topic, the affidavit merely stated: "Defendant InfoWars, LLC does not own or operate the domain name or website located at http://www.infowars.com." [CR 831]. This conclusory affidavit conflicts with the statements on the website, and therefore must be ignored under *Warner Bros.*

Finally, in addition to the website evidence, Appellee submitted a Notice of Violation issued to InfoWars, LLC by the State of California concerning illegal

lead content in supplements sold through the InfoWars website and marketed on InfoWars programming, including The Alex Jones Show. [CR 1812]. Mr. Jones makes a sales pitch for these InfoWars, LLC supplements at the end of Mr. Shroyer's June 26, 2017 video. [CR 1686]. As such there is *prima facie* evidence that InfoWars, LLC was involved in the production the video.

XII. Appellee's Claim Against Shroyer's Employer(s) Arise under *Respondeat Superior*.

In Texas, "[a]n action is sustainable against a corporation for defamation by its agent, if such defamation is referable to the duty owing by the agent to the corporation, and was made while in the discharge of that duty. Neither express authorization nor subsequent ratification is necessary to establish liability." *Warner Bros.,* 538 S.W.3d at 802, *quoting Texam Oil Corp. v. Poynor*, 436 S.W.2d 129, 130 (Tex. 1968); *see also Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 577 (Tex. 2002) (holding that general rule that employer is liable for its employee's tort "when the tortious act falls within the scope of the employee's general authority in furtherance of the employer's business" applies in defamation context).

Here, Appellee can recover based upon *respondeat superior* if (1) he was injured as a result of an independent tort, (2) the tortfeasor was an employee of the defendant and (3) the tort was committed while the employee was acting

within the scope of his employment. *G&H Towing Co.* v. *Magee*, 437 S.W.3d 293, 296 (Tex. 2011). Here, it is undisputed Owen Shroyer is an employee or agent of one or more Appellants. As such, Appellee pled a claim under *respondeat superior* sufficient to survive a motion to dismiss.

XIII. Derivative Torts such as Civil Conspiracy are not Examined under the TCPA.

Civil conspiracy can be pled as "a derivative tort." *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). As this Court wrote last year, civil conspiracy and other derivative forms of recovery are not analyzed in a motion under TCPA when based on another underlying tort:

> The tort is derivative because "a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable." Consequently, courts "do not analyze the trial court's refusal to dismiss plaintiffs' causes of action for conspiracy separately from its refusal to dismiss their other causes of action." In other words, if the trial court did not err by refusing to dismiss the defamation claim, then it did not err by refusing to dismiss the conspiracy claim related to the defamation claim. Accordingly, we conclude that the trial court did not err by refusing to dismiss Jones's conspiracy claim, which is dependent on his defamation claim.

Warner Bros., 538 S.W.3d at 813–14. (citations omitted). In short, a plaintiff need only prove the *prima facie* elements of his underlying case, not his derivative theories of recovery. Conspiracy claims can only be dismissed under

the TCPA if the primary defamation claim fails or if the conspiracy claim alleges acts and omissions independent from the defamation claim.

XIV. The Right to Recover Exemplary Damages is not Examined under the TCPA.

The right to recover any particular scope of damages is not an element of an underlying claim. Last year, the Fort Worth court confirmed that a TCPA motion does not apply to remedies such as exemplary damages:

> These heightened standards [for exemplary damages] do not alter the elements of Khan's underlying claim for defamation/defamation per se. These additional burdens act only as a potential barrier to the damages Khan might recover should Khan prevail on his legal action for defamation/defamation per se at trial. As will be discussed below, the TCPA applies to the dismissal of causes of action, not remedies, and while obtaining an award of exemplary damages might require further proof at trial, the elements Khan must prove to recover general damages under his legal action for defamation/defamation per se remain unchanged.

Van Der Linden v. Khan, 535 S.W.3d 179, 202 (Tex. App.—Fort Worth 2017, pet. filed). For these reasons, InfoWars' argument about a correction request is irrelevant to the resolution of its Motion. [Appellants' Br. 55].

In any case, under Section 73.055(c) of the Texas Civil Practice & Remedies Code, a claimant seeking exemplary damages must request a correction "not later than the 90th day after receiving knowledge of the

publication." Mr. Heslin received knowledge of the publication "[d]uring the first week of April 2018." [CR 1711, ¶17]. Mr. Heslin requested correction days later, on April 11, 2018. [CR 2735].

XV. InfoWars' Objections are Improperly Briefed.

Before filing its brief, InfoWars sought and received an extension of time. Yet a few days before its extended due date, InfoWars filed an "emergency" Motion to Enlarge Brief and Motion to Expedite. Appellants claimed they needed to file an oversized brief because they intended to have this Court consider voluminous objections.

This Court did not grant the enlargement, yet InfoWars found a way to evade the limit. Instead of actually briefing its objections, InfoWars abandoned all pretense at prose and inserted bullet point citations to its written objections filed in the trial court. InfoWars' brief provided page after page of these bullet-points, expecting this Court to play the role of advocate by decoding its list and cross-referencing the record for potential errors. There is no way to intelligently respond to this laundry-list of bullet points which objects to virtually every statement in every affidavit.

"These points of error are general, multifarious, and not in compliance with briefing rules." *Flesher Const. Co., Inc. v. Hauerwas,* 491 S.W.2d 202, 207 (Tex. Civ. App.—Dallas 1973, no writ). A brief is improper when it "fails to set

forth any details" on a point of error or "attempts to incorporate by reference arguments advanced in [another document]." *Young v. Neatherlin*, 102 S.W.3d 415, 423 (Tex. App.—Houston [14th Dist.] 2003, no pet.). "The Rules of Appellate Procedure plainly require the issues and pertinent facts to be set forth in the brief itself." *Id., citing* Tex. R. App. P. 38.1.

Here, InfoWars even admitted its brief was improper. InfoWars claimed that "[b]ecause of appellate brief word limits," it was forced to provide "record citations to the more detailed objections and authorities for the objection in the trial court." [Appellants' Br. 62]. It is clear that InfoWars improperly directed the Court to another document because actual argument "would result in [Appellant's] brief exceeding the fifty-page limit set forth in Rule 38.4" *Id.*

CONCLUSION

InfoWars' appeal is meritless because the Motion had not yet been denied by operation of law. Even if it had, InfoWars wrongfully withheld evidence in violation of the trial court's order. Nonetheless, even with the record before it, the trial court would have been correct in denying the Motion. As such, Appellee prays that this Court affirms the trial court below and remands the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by the Texas Rules of Appellate Procedure Rule 9.4(i)(3), I certify that the Appellees' Brief contains 14,960 words, excluding the parts of the Brief that are excepted by Texas Rules of Appellate Procedure Rule 9.4(i)(1).

This brief complies with the typeface requirement of Texas Rules of Appellate Procedure Rule 9.4(e) as it has been prepared in a proportionally spaced typeface using Word 2018 in Cambria 14 point (12 point for footnotes).

MARK D. BANKSTON

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2018 the forgoing document was served upon all counsel of record via electronic service, as follows.

Via E-Sevice: fly63rc@verizon.net

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