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

NO. 03-19-00811-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-18-001835
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 filed a defamation suit against Alex Jones, Owen Shroyer, Free Speech Systems, LLC, and InfoWars, LLC (collectively, "InfoWars"). [CR 5]. On July 13, 2018, InfoWars moved to dismiss Heslin's claim under the Texas Citizen's Participation Act. [CR 718]. Heslin filed a Motion for Expedited Discovery. [CR 1424]. On August 30, 2018, the trial court held a hearing on the Motion for Expedited Discovery and the TCPA Motion. [RR 1]. On August 31, 2018, the trial court ordered discovery and depositions. [CR 2812]. A month later, InfoWars refused to answer, and Heslin filed a Motion for Contempt. [CR 3060]. The following day, InfoWars initiated a premature appeal which was ultimately dismissed a year later for want of jurisdiction. *Jones v. Heslin*, 587 S.W.3d 134, 135 (Tex. App.—Austin 2019, no pet.).

Upon return to the trial court, InfoWars took no steps to comply with its discovery obligations but nonetheless requested a ruling on its TCPA Motion. On October 3, 2019, the court held a hearing on the TCPA Motion and Heslin's pending Motion for Contempt. [CR 3286]. On October 18, 2019, the Court denied the TCPA Motion and granted the Motion for Contempt. [*Id.*]. As a sanction, the court ruled that "Plaintiff's burdens in responding to the Defendants' TCPA Motion shall be taken to be established in favor of the Plaintiff for the purposes of the TCPA Motion." [*Id.*]. In this appeal, InfoWars

challenges the denial of its TCPA Motion, but it does not challenge or even mention the trial court's dispositive contempt order.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary under Rule 39.1(a) because the appeal is frivolous.

ISSUE PRESENTED

Did the trial court err by denying the TCPA Motion even though the unchallenged contempt ruling required the court to find Heslin's burdens had been established, and even though Heslin nonetheless provided *prima facie* evidence supporting his claim?

Suggested Answer: No, the trial court's unchallenged contempt order renders InfoWars' appeal frivolous, and even if the contempt order did not exist, Heslin provided ample evidence of defamation.

STATEMENT OF FACTS

I. Introduction

After multiple appeals, this Court is well aware of Mr. Jones' obsessive campaign to convince his viewers that the Sandy Hook school shooting was "a giant hoax," "synthetic," and "completely fake with actors." [CR 1644]. Because Mr. Heslin dared to speak out against Mr. Jones' 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. In 2017, as Jones' inflammatory statements began to reach an ever-wider audience, Megyn Kelly convinced Mr. Heslin to appear for an interview to discuss InfoWars' lies about Sandy Hook. [CR 1695]. 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 1511].

One week later, InfoWars retaliated with a cruel and false accusation against Mr. Heslin delivered by InfoWars host Owen Shroyer, who claimed 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 1532]. 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 424]. 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. [*Id.*]. With an air of arrogant mockery, Mr.

Shroyer claimed that Mr. Heslin's statements were "not possible." [CR 423]. When Heslin learned about the video, he brought this lawsuit.

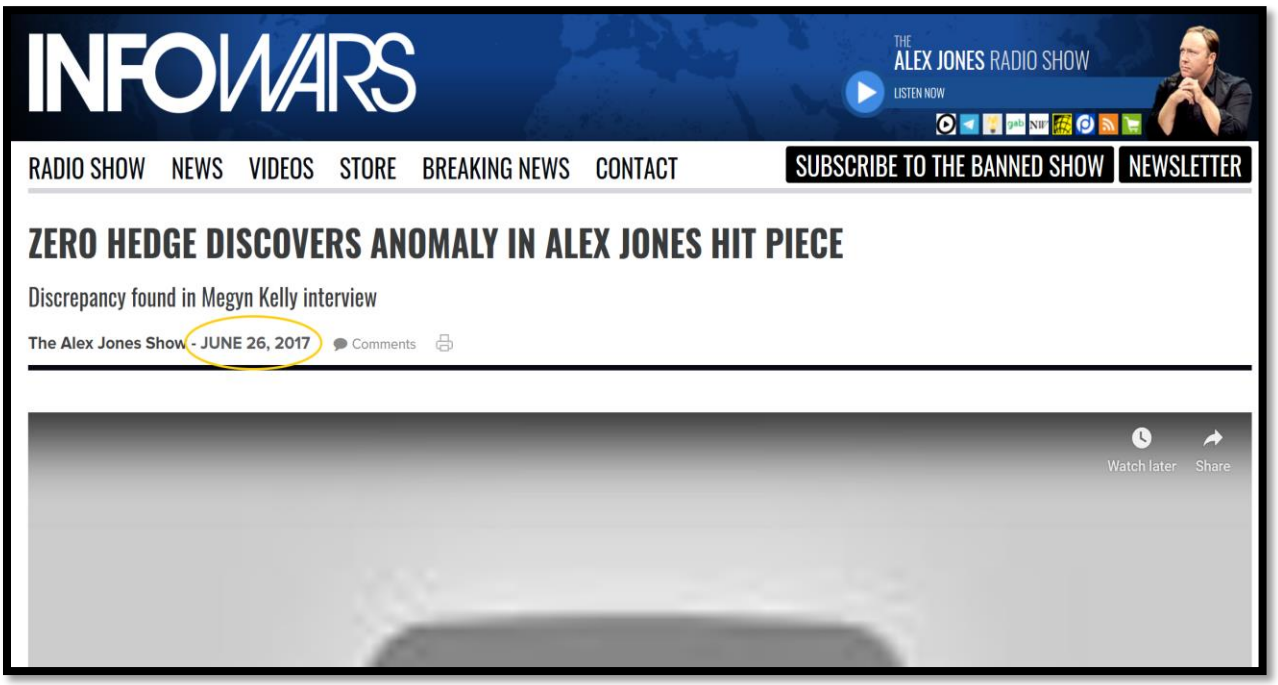
II. The Disputed Video

A. The Date of the Video

Heslin 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." [Appellants' Br. 30]. InfoWars claims the publication challenged by Heslin 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 copious evidence regarding a separate June 26 video, including five separate affidavits from individuals who reviewed the video.

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 1660]. Like, Fred Zipp testified about the June 26, 2017, YouTube video. [CR 1511]. This video was entitled "Zero Hedge Discovers Anomaly in Alex Jones Hit Piece." [CR 1510]. The record includes a transcript and full digital copy of the June 26, 2017 video, which is only five minutes long. [CR 1531; 1670]. Likewise, Mr. Heslin, along with witnesses Dr. Wayne Carver and Scarlett Lewis, all stated they

viewed the June 26, 2017 YouTube video. [CR 1695; 1700; 1703]. Heslin's petition also identifies the InfoWars.com URL on which the June 26, 2017 video was also published. [CR 8]. The hyperlink in the petition remains live, and directs to an InfoWars.com page dated June 26, 2017:



The trial court ordered InfoWars to respond to numerous discovery requests about the June 26, 2017 video [CR 2812], but InfoWars disobeyed the court and refused to answer. [CR 3286]. In any case, the June 26, 2017 video was edited from the much longer video that had been live-streamed on June 25, 2017. The edited video was then published to the InfoWars website and to YouTube as a separate publication, 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 YouTube 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 384]. 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).

B. The Content of the Video

Mr. Zipp's affidavit described the premise 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 1511].

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 1532-33].

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 1511]. 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 1533].

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

only the initial identification process, Dr. Carver stated "we did not bring the bodies and the families into contact. We took pictures of them." [CR 424]. 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 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 1533]. Heslin 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 2400]. Free Speech Systems, LLC employs Mr. Shroyer as a reporter. [CR 36]. InfoWars, LLC operates the InfoWars.com website, where the challenged statements were published. [CR 1711].

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).

ARGUMENT

I. InfoWars Brief Ignores the Unchallenged Contempt Order and its Dispositive Effect.

When a cause of action becomes subject to dismissal, the TCPA process allows for discovery so that plaintiffs can fairly explore the facts and amend their petition if appropriate. Those facts may be worse than a plaintiff initially understood, and discovery may allow a plaintiff to add further content to the allegations in the petition.

Here, Heslin was denied that opportunity because InfoWars brazenly disobeyed the trial court's discovery order both before and after remand of its defective appeal. [CR 3060; 3286]. When discussing Heslin's Motion for Contempt in oral hearing, the trial court explored with Heslin's counsel each

element of InfoWars' TCPA Motion and how discovery could aid in responding. [RR 31-33]. That discussion showed how "every single part of this motion hinges on discovery." [RR 33]. Since discovery could produce evidence on every element, including evidence which could change the very meaning of the published statements [RR 31:16-25], there is virtually no limit to how discovery could have altered the lawsuit. For that reason, the Contempt Order ruled that:

> [T]he matters which the August 31, 2018 order was made (Plaintiff's burdens in responding to the Defendants' TCPA Motion) shall be taken to be established in favor of the Plaintiff for the purposes of the TCPA Motion. [CR 3286].

The trial court rightly found that a defendant cannot intentionally refuse to provide all discovery and then seek dismissal when the discovery could have dramatically changed the content of a plaintiff's allegations. Any other result would provide a perverse incentive for certain defendants to intentionally disobey discovery orders.

Most importantly, InfoWars did not challenge or even mention the dispositive Contempt Order. By not challenging the sanction, InfoWars cannot dispute Heslin's burdens were met. The record as it exists now is irrelevant, and all of InfoWars' arguments based on that record are frivolous. Due to InfoWars' discovery violations, the trial court was forced to contemplate a hypothetical

record -- the record that might have been -- from which it had to assume to Heslin's burdens would have been met.

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

Even on the record provided, Heslin easily prevails on each element of his claim, starting with the video's potential to create 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 1695].

Heslin also submitted the affidavit of 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 1699]. 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 1700].

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 1659]. 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.
>
> …
>
> 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 1661].

InfoWars' TCPA Motion to Dismiss continued to make the same accusation as Mr. Shroyer -- that Heslin "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 109]. InfoWars' Motion doubled-down on the accusation, stating that "regardless of what others reported, the medical examiner stated that the bodies were not

released." [*Id*]. Just like Mr. Shroyer, InfoWars' TCPA Motion misrepresented the statements made by the medical examiner.

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 1512]. 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 1667, ¶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." [*Id.,* ¶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 2441]. Mrs. McDonnel began her answer by stating, "And I had questioned maybe wanting to see her." [*Id*]. InfoWars used this clip to "prove" 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 1668, ¶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 1678].

A couple questions earlier, Mrs. McDonnel stated they were "able to be with her." [CR 1677-78]. 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 1524]. In doing so, InfoWars published "false statements about [Heslin's] honesty or integrity." [CR 1512].

III. 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.)

While discovery could have provided extrinsic evidence on this issue, Heslin easily prevails on the existing record. Here, the only meaning of the statements is defamatory. As Mr. Zipp's affidavit explains, 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 1512]. Mr. Zipp noted "Mr. Shroyer also made it clear that he was not accusing Mr. Heslin of an innocent mistake." [CR 1513]. 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, the only possible gist is that Heslin was intentionally lying to a national audience. In the *Lewis* case, this Court cited the statements made by Shroyer as an example of statements which "dispute whether the events at Sandy Hook occurred or were part of an elaborate hoax." *Jones v. Lewis*, 03-19-00423-CV, 2019 WL 5090500, at *4 (Tex. App.—Austin Oct. 11, 2019, pet. filed)

Heslin 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 1700]. 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, Scarlett Lewis testified that she understood the video to be asserting that Heslin "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 1703]. 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*]. As such, even without the effect of the Court's contempt order, Heslin has shown the video carries a defamatory meaning and attacks his honesty, integrity, and virtue.

IV. 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, Mr. Shroyer's remarks pass the verifiability test: Either Mr. Heslin is telling the truth about holding his child or he is not.

Likewise, Shroyer's statements pass the context test because some viewers 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 1661, ¶24]. Mr. Zipp observed that Shroyer "also referenced the involvement of unspecified "fact-checkers," which obviously signals an assertion of fact, not an opinion." [CR 1523].

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 1532]. 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 statements of fact.

V. 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 is not 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.

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). 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 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 1660].

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 1533].

Under Texas law, a plaintiff 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). As Ms. Binkowski pointed out, "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 1660-61].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.

Ms. Binkowski concluded that "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." [CR 1660]. InfoWars did not merely report a third-party's statement, but enthusiastically endorsed the accusation.

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 a fully 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 1668]. 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 false claim. 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 an 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 1662].

InfoWars 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 1662-65]. In fact, given the trial court's contempt order, this Court must assume discovery would have confirmed an InfoWars employee wrote the Zero Hedge article. As noted above, the existing record is meaningless.

In any case, 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.

VI. Heslin 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 national guns rights issue arising out of Sandy Hook." [Appellants' Br. 38]. Yet Mr. Shroyer's video had nothing to do with gun rights. Rather, the Megyn Kelly interview and Mr. Shroyer's subsequent video arose from the public dismay over Mr. Jones' statements about Sandy Hook and his attacks on the credibility of the parents. 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.

Mr. Jones inflicted this notoriety upon Heslin with his incessant 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 1695].

"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 1694].

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. As this Court found in *Pozner,* even if the plaintiff's gun advocacy "sufficed to make her a public figure for the limited purpose of the debate on gun control and that she remained a public figure in 2017, she nonetheless remained a private individual for purposes of the debate about whether the Sandy Hook shooting was staged." *Jones v. Pozner*, 03-18-00603-CV, 2019 WL 5700903, at *8 (Tex. App.—Austin Nov. 5, 2019, no pet. h.).

In this case, InfoWars tries to define 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. 39]. 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 [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 Heslin 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 Heslin injected himself into any discussion about whether the government or media were using tragedies to push an agenda.

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 85]. 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 because of Mr. Heslin's public acts.

VII. 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 1510; 1524]. Justice Bourland echoed that sentiment in *Warner*

Bros., 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 1526].

Ms. Binkowski's affidavit details how "[t]he allegation made by Mr. Shroyer was outlandish, inherently improbable, and obviously dubious." [CR 1667]. 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 1662]. 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 1663].

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 1663-66]. 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 1662].

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 1665]. 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 1666]. 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. 8]. This is completely false. InfoWars first cited a 2009 article from the *Columbia Journalism Review*, but that 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." [CR 1891]. 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 1893]. 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 1895]. InfoWars also cited a *Business Time* article from 2009 which called Zero Hedge's information "half-baked hooey." [CR 1899]. 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 1184]. 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 1185]. 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 1667].

2. Jim Fetzer

The anonymous blog post on Zero Hedge cited an individual named Jim Fetzer to support the accusation that Mr. Heslin was lying. [CR 1524]. 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 1526-27].

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 1526]. 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 1527]. 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. [*Id.*].

Mr. Fetzer's reputation was well-known inside InfoWars. During a deposition in a related case, Mr. Jones testified his chief editor Paul Watson "was saying that some of the people that were out there putting stuff out, like

Fetzer and others in that, were not good." [CR 3192]. This is quite an understatement. On December 17, 2015, Paul Watson wrote to two of his coworkers to let them know he had sent Alex Jones the following message:

> This Sandy Hook stuff is killing us. It's promoted by the most batshit crazy people like Rense and Fetzer who all hate us anyway. Plus it makes us look really bad to align with people who harass the parents of dead kids. It's gonna hurt us with Drudge and bringing bigger names into the show. Plus the event happened 3 years ago, why even risk our reputation for it?4

As Mr. Zipp concluded, "InfoWars' uncritical endorsement of accusations being promoted by Mr. Fetzer demonstrates its reckless and deceptive conduct." [CR 1527].

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 1667].

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 2409]. 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 1526].

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 1666-67]. 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 1668].

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 2410].

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 1668]. 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 1526]. Mr. Zipp concluded "[t]hese actions were aimed at manufacturing a controversy where none existed." [CR 1522].

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 1527]. 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 1515-16]. 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 390].

Appellee also submitted Mr. Zipp's affidavit from another pending lawsuit involving Sandy Hook parents, Veronique De La Rosa and Leonard Pozner. 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 1631-57]. In over twenty videos in the past few years, Mr. Jones 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 1634].
- The school was actually closed until that year. [CR 1635]
- 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 1642].

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 1647]. 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 1668]. 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. The testimony of InfoWars' employees demonstrates actual malice.

In a related lawsuit, Plaintiff's counsel was able to take depositions of Mr. Jones as well as a former employee, Robert Jacobson. Mr. Jones' deposition was a three-hour admission of actual malice. Mr. Jones candidly admitted he performed no corroboration of the conspiracy claims being given to InfoWars by self-styled investigators Jim Fetzer, noting that "we did not ourselves investigate Sandy Hook." [CR 3193]. Jones confirmed that he repeated dubious information with no fact-checking. [CR 3192-95]. Jones admitted InfoWars was provided information from

various people who had been debunking the claims made on Mr. Jones' show. [CR 3195-96]. Jones claimed that he accepted Fetzer's conspiracy claims at face value because "I, myself, have almost had like a form of psychosis back in the past where I basically thought everything was staged." [CR 3196]. During his testimony, Mr. Jones was repeatedly confronted with video clips of the bizarre claims made on his show, and he was completely unable to provide a coherent explanation as to how those allegations ever made it to air. [CR 3205-3250]. In sum, Mr. Jones admitted InfoWars published inherently improbable and dubious claims about Sandy Hook with no corroboration.

Plaintiff's counsel was also able to depose former InfoWars' editor Robert Jacobson, who worked with the company from 2004 to 2017. [CR 3197]. Jacobson testified that he repeatedly confronted the writing staff and "attempted to make it as clear as possible to the writers that there is something called journalist ethics and how what they were doing was in a direct violation of that anytime I caught wind of the Sandy Hook story on InfoWars." [*Id.*]. Jacobson testified that he was always "received with laughter and jokes" by the writers, who "mocked [his] concerns about Sandy Hook coverage." [CR 3198]. The conduct described by Jacobson was outrageous and reckless. [CR 3199-3201].

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

Mr. Zipp further 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 1527]. Mr. Zipp described InfoWars reckless history of telling its audience that every national tragedy is fake. [CR 1528]. 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 1529]. 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 1706]. 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 1529].

VIII. InfoWars' 2017 Statements Caused Damages to Appellee.

As an initial matter, evidence of damages is unnecessary in this appeal since the contempt order provides that all of Heslin's burdens are taken as established. Further, evidence of damages is unnecessary because this claim involves defamation per se. "Defamation per se occurs when a statement is so obviously detrimental to one's good name that a jury may presume general damages, such as for loss of reputation or for mental anguish." *Pozner*, 2019 WL 5700903 at *4. Here, as in *Pozner,* Heslin has "established a *prima facie* case that Appellants' statements were defamatory per se, we may presume nominal damages, which are sufficient to defeat Appellants' motion to dismiss." *Id.* at *9.

In any case, InfoWars' act of retaliation against Mr. Heslin caused him distinct 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…

> 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 1696].

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 1697].

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 1696]. InfoWars claims that Heslin's grief over 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' harassment campaign. Yet as Mr. Heslin makes clear in his affidavit, this experience was an entirely new form of distress. This Court rejected an identical argument from InfoWars in the *Pozner* case, finding a similar testimony sufficient to defeat the TCPA Motion:

> In affidavits attached to their response to the motion to dismiss, the parents detail their mental anguish and distress as a result of the 2017 broadcasts, which they assert renewed their fears following five years of enduring harassment from hoaxers. In addition, Pozner submitted a supplemental affidavit detailing expenses for medical treatment and for measures taken to secure his family's privacy and safety at home

> following the 2017 broadcasts. De La Rosa details similar expenses in her supplemental affidavit.

Pozner, 2019 WL 5700903 at *9.

Finally, InfoWars argues that Mr. Heslin cannot prove he suffered damages because he appeared on television in two interviews to denounce Shroyer's video as a lie, and that portions of the video were played before his interview. Based on no evidence, InfoWars asserts "[Heslin] authorized republication, to millions of people, of the same broadcasts he alleges are defamatory."[1] There is nothing in the record showing Heslin played any part in choosing how a TV network would present or edit its show, or that he did anything beyond agreeing to an interview. This issue was not raised in the TCPA Motion, and if it had been, Heslin would have been able to provide affidavits showing he played no role in the decision to use excerpts from Mr. Shroyer's video.

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

As in its other appeals, Appellants continue to allege there is no evidence of publication by InfoWars, LLC. However, Heslin produced *prima facie* evidence that InfoWars, LLC operates the InfoWars.com website in the form of a "Terms of Use & Privacy Policy" found on the InfoWars website. [CR 1709].

[1] P. 16

This document identifies InfoWars, LLC as the administrator of the website [CR 1713], and the text informs users of agreements they have made "by using Infowars.com." [CR 1728]. Indeed, the document states that InfoWars, LLC administers every "Uniform Resource Identifier we use to provide our Products and Services." [CR 1713]. In its brief, InfoWars completely ignores this evidence, misrepresents that no evidence was offered by Heslin, and relies on its own affidavit disclaiming any involvement by InfoWars, LLC. [CR 820].

This Court previously resolved this issue last year in *Infowars, LLC v. Fontaine.* This Court found "under the Terms of Use, use of Infowars.com initiated a relationship between the user and Infowars, LLC, and Infowars, LLC was involved in the website's operation," thus establishing "the minimum quantum of evidence necessary to support a rational inference that Infowars, LLC is a proper defendant." *Infowars, LLC v. Fontaine*, 03-18-00614-CV, 2019 WL 5444400, at *3 (Tex. App.—Austin Oct. 24, 2019, pet. filed). In doing so, this Court ruled in accord with its prior decision in *Warner Bros*., where the plaintiff likewise 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.

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 1796]. Mr. Jones makes a sales pitch for these InfoWars, LLC supplements at the end of Mr. Shroyer's June 26, 2017 video. [CR 1670]. As such there is *prima facie* evidence that InfoWars, LLC was involved in the production the video.

X. InfoWars' Groundless Constitutional Complaints were Waived.

InfoWars' TCPA Motion did not raise a constitutional challenge. [CR 718-800]. As a general rule, a constitutional claim must have been asserted in the trial court in order to be raised on appeal. *Dreyer v. Greene,* 871 S.W.2d 697 (Tex.1993). There are two exceptions to the general rule: (1) a constitutional challenge may be presented for the first time on appeal if the challenge presents a fundamental error and (2) a constitutional violation may be raised for the first time on appeal if the constitutional violation was not recognized before the case was appealed (the "right not recognized" rule). *See General Motors Acceptance Corporation v. Harris County Municipal Utility District # 130,* 899 S.W.2d 821 (Tex.App.-Houston [14th Dist.] 1995, no writ); *Jones v. Martin K. Eby Construction Company, Inc.,* 841 S.W.2d 426, 428 (Tex.App.-Dallas 1992, writ den'd).

A fundamental error only occurs "in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly

and adversely affected as that interest is declared in the statutes or the Constitution of Texas." *Pirtle v. Gregory,* 629 S.W.2d 919, 920 (Tex. 1982). Here, there is no jurisdictional issue nor an issue of the public's interest being directly and adversely affected as the interest is declared in the statutes or the constitution. Thus, neither of the "rare instances" is present in this case.

Under the "right not recognized" rule, the failure to present a constitutional challenge to the trial court is excused when (1) the claim was so novel that the basis of the claim was not reasonably available or (2) the law was so well settled that an objection would have been futile. *Jones v. Martin K. Eby Construction Company, Inc., supra* at 428. Neither of the circumstances of the "right not recognized" rule is present in this case.

In any case, there is no substance to InfoWars' new constitutional arguments. InfoWars generically asserts that its speech should be protected based on Supreme Court cases such as *Sullivan, Hustler,* and *Whitney*. InfoWars continues to assert that Heslin is a public figure who must prove actual malice. Yet as noted above, Heslin is a private figure, and there is clear evidence of actual malice regardless. Even if the record didn't show malice, the Contempt Order requires this Court to assume it exists and would have been established in discovery. Indeed, every constitutional defense is fact-intensive, but

InfoWars thwarted any attempt to discover facts, thus leading to the dispositive Contempt Order.

InfoWars also cited the Supreme Court's decision in *Snyder v. Phelps*, in which the Court rejected a cause of action for intentional infliction of emotional distress against the Westboro Baptist Church for their protest on a public street outside a military funeral. InfoWars argues that its speech requires similar shelter. Yet when Chief Justice Roberts delivered the Court's opinion in *Phelps,* he warned against any "attempts to draw parallels between this case and hypothetical cases involving defamation," noting that there is "no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment protection,'" such as defamatory statements. *Snyder v. Phelps,* 562 U.S. 443, 451 n.3 (2011). Freedom of speech sometimes requires us to tolerate ugly sentiments, but the Constitution provides no refuge for liars.

XI. 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 1695, ¶17]. Mr. Heslin requested correction days later, on April 11, 2018. [CR 2719].

XII. 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."

XIII. InfoWars' Objections are Baseless and Improperly Briefed.

Much like its prior briefing, InfoWars insists on alleging countless errors buried among hundreds of evidentiary objections. Once again, InfoWars uses bullet point citations to its voluminous written objections filed in the trial court, just as it did in *Pozner,* 2019 WL 5700903 at n. 2 ("Appellants have included, in primarily bullet-point form, several pages of objections to various portions of evidence relied on by the parents. Most of these objections are single words or

phrases that contain no analysis or citations to legal authority."). InfoWars again expects 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 objections to virtually every statement in every affidavit in general boilerplate terms, with no specific discussion or application.

"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. For this reason, Heslin will only address the objections which are set forth in actual argument, to the extend he understands them.

A. Zipp and Binkowski Affidavits

Both Mr. Zipp and Ms. Binkowski's testimony has already been relied on by this Court over InfoWars' objection in the *Pozner* and *Fontaine* cases, and their testimony here is substantially similar in form. Both Mr. Zipp and Ms.

Binkowski provided a summary of their relevant qualifications, and they both relied on videos, transcripts, and reference materials normally be relied upon by a journalism expert conducting a factual review. Neither provided conclusory testimony, but instead provided extensive factual description for their conclusions.

B. Heslin Affidavit

Most of InfoWars objections are frivolous on their face. For example, InfoWars claims Mr. Heslin cannot offer testimony relating to public figure status since it involves a question of law. Yet the Court obviously needs a factual record to decide questions of law, and Mr. Heslin's testimony shows he did not purposefully inject himself into this controversy. InfoWars also complains about frivolous matters such as Heslin's summary of the video he viewed. Does InfoWars really believe the trial court committed reversible error for not striking Heslin's summary of a video which is already in evidence? As in other appeals, InfoWars' objections serve only to burden Heslin and this Court.

C. Carver and Lewis Affidavits

InfoWars makes several objections which assert that a third party's understanding of the publication is irrelevant. This argument directly conflicts with the reliance on third-party affidavits in numerous Texas cases, including *Cox Texas Newspapers, L.P. v. Penick,* 219 S.W.3d 425, 433 (Tex. App.—Austin

2007, pet. denied), *Backes v. Misko*, 486 S.W.3d 7, 24-25 (Tex. App.—Dallas 2015, pet. denied), and *Tatum v. The Dallas Morning News, Inc*., 493 S.W.3d 646, 659 (Tex. App.—Dallas 2015, rev'd on other grounds). Such affidavits can show that a publication was "of or concerning" a plaintiff or to support a reasonable inference that some people found the matter defamatory towards the plaintiff. The affidavits of Dr. Carver and Ms. Lewis serve that purpose here. In addition, the affidavit of Dr. Carver helps establish the falsity of Mr. Shroyer's publication.

CONCLUSION

InfoWars' appeal is frivolous. The discovery sanction requires the trial to find Plaintiff's burdens in response to the TCPA Motion have been met, and that discovery sanction has not been challenged on appeal. Even if the sanction did not exist, the trial court would have been correct in denying the Motion. As such, Mr. Heslin prays that this Court affirms the trial court, awards costs, and remands the case for further proceedings as soon as possible.

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 13,939 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 January 28, 2020 the forgoing document was served upon all counsel of record via electronic service, as follows.

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