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 REPLY IN SUPPORT OF HIS MOTION FOR SANCTIONS FOR FRIVOLOUS APPEAL UNDER TEX. R. APP. 45

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ARGUMENT

I. Mr. Heslin's Counsel Conferred with Opposing Counsel; He was Ignored.

InfoWars' Response claims counsel never conferred about the motion, stating "had there been a conference, perhaps the Parties could have clarified, stipulated, or otherwise solved some or all of the issues." (Response, p. 4). Yet as shown in the attached exhibit, Mr. Heslin's counsel did confer with InfoWars' counsel on January 23, 2020. (*See* Exhibit 1 – Meet & Confer Letter). The letter discussed each element of the proposed motion. The letter closes by stating, "I assume you will be opposed to the motion." (*Id.*). InfoWars chose not to respond. After days without any response from InfoWars' counsel, Mr. Heslin filed his motion the following week on January 28, 2020.

In short, Mr. Heslin's counsel conferred about the motion, but InfoWars' counsel chose to ignore him. InfoWars is correct that "[t]here are sound reasons requiring lawyers to talk." (Response, p. 4). Yet its counsel refused to do so. Perhaps Mr. Heslin's certificate of conference should have been changed to indicate that InfoWars' counsel chose to ignore opposing counsel. Yet given the wording of the letter – "I assume you will be opposed" – Mr. Heslin's counsel felt the more charitable interpretation was that counsel's silence was meant to confirm InfoWars was indeed opposed to the motion. Mr. Heslin's counsel had no desire to specifically "call out" opposing counsel for ignoring the letter in the certificate of conference. Yet now

InfoWars has made accusations of "false certifications" when the truth is Mr. Heslin's counsel were merely taking the most benign view of InfoWars' counsel's silence.

Finally, regarding the certificate of service, Mr. Heslin's counsel mistakenly believed InfoWars' lead attorney had added himself to the electronic service list. It turns out only trial counsel had added himself to the list. When this was pointed out, Mr. Heslin's counsel immediately provided a copy of the motion and agreed not to oppose an extension of time to respond.

II. Failure to Disclose the Contempt Order

Mr. Heslin's sanctions motion caused InfoWars to abandon nearly every argument in its principal brief. InfoWars now seems to concede that nearly its entire argument section up to page 46 of its principal brief was completely irrelevant, covering Mr. Heslin's *prima facie* elements which are unquestionably controlled by the sanctions order it refused to disclose. Due to this lack of candor, Mr. Heslin was forced to brief these issues for no reason. InfoWars sandbagged Mr. Heslin, forcing him to respond to page after page of frivolous arguments, only to make entirely new arguments in the Reply Brief. InfoWars shows no remorse whatsoever for this enormous waste of time.

InfoWars now tries to argue that a small portion of its brief is still salvageable because "[t]he discovery sanction is not dispositive of this case." (Response, p. 6). InfoWars argues the order only applies to the *prima facie* elements of the claim, not the defenses in the TCPA Motion. However, the order is not limited to Plaintiff's

burdens for a *prima facie* case for defamation. Rather, the order covers "Plaintiff's burdens in responding to Defendants' TCPA Motion," which includes the defenses asserted in that motion. (CR 3286). It was the clear intention of the trial court that the discovery sanction should render the entire TCPA Motion moot. InfoWars maintains it can still assert Mr. Heslin failed in defeating certain defenses in its TCPA Motion, but this contradicts the plain language of the order. Logically, the order applies to all parts of the TCPA Motion since discovery could have aided Mr. Heslin in responding to the defenses as well. The trial court clearly realized InfoWars cannot be allowed to block discovery on the underlying facts and then assert defenses such as substantial truth or a fact-intensive constitutional complaint. Any other result defies common sense; it would be ironically perverse to allow a party to profit from blocking the discovery of facts concerning a "truth" defense.

In any case, all of these arguments should have been made in the parties' principal briefing. Mr. Heslin should not have been forced to argue about the contempt order in a reply to a sanctions motion. All of this occurred because InfoWars "omitt[ed] an obviously important and material fact in the petition." *In re City of Lancaster*, 228 S.W.3d 437, 440–41 (Tex. App.—Dallas 2007, no pet.).

III. The Existence of a June 26th Video

InfoWars' brief unequivocally claimed there was no June 26th video. Indeed, a section of its brief was devoted to this false assertion. Now, in response to a motion for sanctions, InfoWars finally admits there is a "broadcast that was posted on Free

Speech Systems, LLC's website, www.infowars.com, on June 26, 2017." (Response, p. 7). InfoWars claims this fact has been suddenly "clarified," but Mr. Heslin has repeatedly explained the June 26th video in pleadings and hearings for two years. Most importantly, it is InfoWars' own video. Even the most basic diligence by InfoWars would have revealed the existence of the June 26th video. It cannot be overemphasized that InfoWars sought dismissal based on misrepresenting the existence of a video which is thoroughly documented in its own corporate records and the internet. An appellant has a duty to fairly portray the facts. "Misrepresenting the facts in the record not only violates that duty but subjects offenders to sanctions." *Schlafly v. Schlafly,* 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

InfoWars next raises a new argument that Shroyer cannot be held liable for his statements made in the course of his employment when they were published a day after he physically said the words. This is akin to arguing a magazine writer cannot be liable for defamation because he physically wrote the words weeks prior to the publication of the magazine. In any case, this argument was only raised after InfoWars' misrepresentation was pointed out, and it has never been fairly briefed.

IV. Republication Argument

This argument was never raised in the TCPA Motion. Defendants' republication argument was asserted on August 29, 2018, the day prior to the TCPA hearing. It was contained in an Amended Answer (CR 2046), along with a filing purporting to be an

Amended TCPA Motion (CR 2006). However, a motion under the TCPA "must be filed not later than the 60th day after the date of service of the legal action." TCPRC 27.003. Mr. Heslin was never provided any opportunity to respond to this untimely "amended" motion, which was filed 135 days after the lawsuit. The arguments made therein are not part of the TCPA Motion and have not been preserved for review.

Nonetheless, with no evidence, InfoWars continues to insist Mr. Heslin "consented to, authorized, or invited the republication, to millions of people, of the broadcast he alleges is defamatory." (Response, p. 8). All InfoWars can say is that Heslin gave interviews on two television shows which also played a segment of the InfoWars video during their programs. There is no evidence Mr. Heslin had any control over what was played before or after his interview on those shows. The republication argument is frivolous, and unpreserved in any case.

V. Liability of InfoWars, LLC

In a single sentence, Appellants claim their argument regarding InfoWars, LLC was not frivolous for the reasons set forth in Appellants' Brief and Reply Brief. Yet Appellants' Reply Brief never mentions InfoWars, LLC, and as shown in Mr. Heslin's Motion for Sanctions, Appellants' principal brief ignored the controlling case law in *Fontaine* and *Warner Bros.*, and it made no arguments regarding Heslin's evidence. Instead, the brief made a frivolous denial, claiming Heslin offered no evidence at all, all while ignoring the website documentation. This argument was made with no expectation of reversal. Moreover, discovery would have obviously aided Mr. Heslin

in determining the liability of InfoWars, LLC. The court's discovery sanction requires this Court to resolve this issue in Mr. Heslin's favor, yet Appellants continue to frivolously contest this issue.

VI. Constitutional Defense

InfoWars claims its constitutional defense was not waived because its TCPA Motion cited Supreme Court cases such as *Sullivan* and *Hustler*. (Response, p. 9). These citations are included with the sections of the brief describing the purpose of the TCPA and why the statute applies to this case. Yet Mr. Heslin has never disputed this case implicates the TCPA. Rather, Mr. Heslin disputes that InfoWars ever articulated any specific constitutional defense. Appellants' TCPA motion merely notes that speech can be regulated under the constitution, and that the TCPA serves that function. Yet the actual argument section only sets forth substantive arguments about defamation. InfoWars did not articulate a constitutional defense. Furthermore, a constitutional defense is fact-intensive, and InfoWars denied Mr. Heslin's ability to discover facts on such a defense. The trial court clearly did not intend for InfoWars to disobey the discovery order only to prevail on a defense which the discovery could have defeated.

VII. Substantial Truth

On this issue, InfoWars has now introduced a statutory defense in an entirely new argument. Previously, InfoWars relied on a reversed quotation from *Avila v. Larrea* to suggest that the common law afforded a defense for republishing the

defamation of a third party.[1] Now InfoWars has instead claimed it is entitled to statutory protection because it is actually a newspaper and broadcaster. Mr. Heslin was never given an opportunity to brief this argument. Nor did InfoWars make this argument at the trial court. InfoWars never offered any evidence it was a newspaper or broadcaster.

Now InfoWars asks this Court to rule on this new frivolous argument by using judicial notice of its website. Essentially, InfoWars claims that posting on the internet is legally the same as being a newspaper, and that posting a video on YouTube is legally the same as being a broadcaster. InfoWars is wrong. 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) (noting that "electronic news services" such as Reuters are not newspapers). Likewise, 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 is none of these things. In fact, in a prior appeal with this Court, Appellants stated:

> Free Speech Systems does not contest that it is not a newspaper or other periodical in the traditional sense (i.e. pre-online, internet world) or that it is a broadcaster in this

[1] InfoWars claims Mr. Heslin "incorrectly suggests that *Avila v. Larrea*…has been reversed for the proposition cited by Appellants." Actually, Mr. Heslin noted InfoWars' citation to *Avila* was a quotation from this Court's decision in *Neely,* which was reversed on that exact proposition. *Avila* no longer states sound law.

> context within the meaning of Section 73.004(b). (*See InfoWars, LLC v. Fontaine*, No. 03-18-00614-CV, App. Reply Br., p. 16).

In the *Fontaine* case, Appellants maintained that even though InfoWars was a defendant "other than one specifically prescribed in Subpart (b)," it could still rely on "the common law." (*Id.* at p. 15-16). Here, Appellants' new argument contradicts this position, and Mr. Heslin had no opportunity to respond. In any case, InfoWars refused to provide discovery which could have revealed facts relevant to this defense. Once again, it could not be the intent of the trial court to allow InfoWars to conceal facts on this defense only to prevail due to its own contempt of court.

VIII. Troubling Comments

InfoWars' is correct that Mr. Jones' bizarre videos "have to be quoted and discussed." (Response, p. 11). Yet zealous advocacy does not require the brief to adopt and recklessly spread the same false conspiracy theories. InfoWars' Response simply ignored its gross mischaracterization of the statements made by Dr. Carver and Ms. McDonnel. Instead, InfoWars choses to blame "[t]he spin Appellee's counsel places on everything." (*Id.*). Yet Mr. Heslin's counsel are not the ones who advanced a false theory that Ms. McDonnel's and Dr. Carver's statements "corroborate" the notion that parents were not given access to their children's bodies.

IX. Avoiding Delay

InfoWars casts skepticism on Mr. Heslin's desire to avoid delay by citing a prior motion for sanctions, claiming "[t]he reason Appellee's counsel sought sanctions in

that appeal was because Appellants requested this Court expedite a ruling." (Response, p. 12). This is obviously false. Mr. Heslin did not file his sanctions motion because InfoWars requested an expedited ruling. It was filed out of exasperation because InfoWars had filed three successive "emergency" motions with no good cause, forcing Mr. Heslin to respond to each during his briefing period. The third "emergency" motion sought an extension of the word count limit *after* InfoWars' brief had already been filed. Not only was InfoWars abusing the emergency motion process, but a post-brief extension of the word count would have caused delay.

CONCLUSION

InfoWars' counsel suggests bewilderment at having never seen a sanctions motion in an appeal. Likewise, Mr. Heslin's counsel have never seen a party like InfoWars. In an unrelenting course of bad faith litigation conduct in these Sandy Hook cases, InfoWars has on four separate occasions paid or been ordered to pay attorney's fees for nearly $150,000 in sanctions, all before preliminary motions are even resolved. (*See* CR 3287; *see also Jones v. Heslin*, No. 03-20-00008-CV, CR 1659; CR 1662; *Jones v. Lewis,* 03-19-00423-CV, CR 4392). InfoWars has also caused continuous frustration in the appellate process, filing flurries of "emergency" motions as well as non-compliant briefs with bullet point fusillades of "single words or phrases that contain no analysis or citations" in in an attempt to evade the word count. *Jones v. Pozner,* 03-18-00603-CV, 2019 WL 5700903, at *2 (Tex. App.—Austin Nov. 5, 2019, pet. filed). Here, InfoWars' brief was a sloppy collection of misrepresentations which

omitted the critical fact governing the appeal – the existence of a controlling sanctions order. As a result, InfoWars forced Mr. Heslin to brief completely irrelevant issues which have now been abandoned. InfoWars' outrageously frivolous opening brief irrevocably hindered the proper framing of the appeal, causing the parties to argue about numerous unraised substantive issues solely in connection with a motion for sanctions. For all of these reasons, Mr. Heslin should be awarded costs for this frivolous appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2020 the forgoing document was served upon all counsel of record via electronic service, as follows.

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MARK D. BANKSTON

EXHIBIT 1

Meet and Confer
Correspondence

DECLARATION OF MARK BANKSTON

STATE OF TEXAS §
§
HARRIS COUNTY §

I, Mark Bankston, declare under penalty of perjury that the following declaration is true and correct and based upon my personal knowledge:

1. My name is Mark Bankston. I am over the age of 21 and competent to make this declaration.

2. I am an attorney at the law firm Kaster Lynch Farrar & Ball, LLP, 1117 Herkimer, Houston, Texas 77008. I serve as lead counsel for Appellee Neil Heslin.

3. Attached is the meet and confer correspondence I sent on January 23, 2020 relating to Appellee's Motion for Sanctions.

Executed on February 20, 2020 in Harris County, Texas.

MARK D. BANKSTON

From: Mark Bankston
To: David J. Sacks
Cc: Bill Ogden
Subject: Jones, et al. v. Heslin, No. 03-19-00811-CV
Date: Thursday, January 23, 2020 1:34:00 PM

I intend to bring a motion to have your clients' appeal declared frivolous under Tex. R. App. P. 45. Your brief omits critical facts which materially affect the appeal, most notably the existence of the court's dispositive contempt order. Your brief also makes numerous misrepresentations of fact. For instance, your brief maintains there is no June 26 video and that Heslin presented no evidence of a June 26 video, both of which are false. Your brief also raises issues which were not raised in InfoWars' TCPA Motion, such an alleged authorization to NBC to republicize the defamatory statements, as well as new constitutional complaints. Your brief further makes a frivolous argument as to evidence of InfoWars, LLC's involvement. Your brief further raises a frivolous defense of substantial truth. Finally, your brief makes the same troubling and damaging misrepresentations concerning Heslin's access to his son's body that have been made by prior counsel.

Moreover, I do not believe this appeal has been filed with any reasonable belief in the possibility of reversal. Rather, it appears to have been filed purely as a method of delay.

I assume you will be opposed to the motion.

Mark Bankston
Kaster Lynch Farrar & Ball, LLP