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NO. 03-19-00811-CV

IN THE THIRD COURT OF APPEALS,
AUSTIN, TEXAS

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

v.

NEIL HESLIN, *Appellee*

On Appeal from the 53rd District Court,
Travis County, Texas
Trial Court Cause No. D-1-GN-18-001835

APPELLANTS' RESPONSE TO MOTION FOR SANCTIONS

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INTRODUCTION

Appellee has brought a motion for sanctions claiming that this appeal is objectively frivolous. Appellants disagree. In fact, Appellants have several compelling affirmative defenses that are expected to shield them from any defamation claim. *See* Appellants' Reply Brief and Appellants' Brief.

Appellants are media defendants whose constitutional rights of free speech and perhaps association are under attack by Plaintiff's counsel in 5 cases in Austin at largely the same time. Three of those cases have been through this Court and are currently before the Texas Supreme Court on Petitions for Review. Plaintiffs' counsel filed waiver letters in all three cases, and so far, the Texas Supreme Court has asked the Plaintiffs to file responses in two of the cases. We expect the Texas Supreme Court to ask the Plaintiff to file a response in the third case soon. The other two cases are currently pending before this Court.

Appellants are seeking dismissals in all five of the cases because their First Amendment rights are being improperly attacked in a coordinated effort to improperly stop free speech. Appellants have a reasonable basis to believe they will ultimately prevail in all the cases.

The Parties generally agree that *Glassman v. Goodfriend* sets forth the standard for a motion for sanctions:

> "To determine whether an appeal is objectively frivolous, we review the record from the viewpoint of the advocate and decide whether the advocate had reasonable grounds to believe the case could be reversed." *Glassman v. Goodfriend*, 347 S.W.3d 772, 782 (Tex.App.–Houston [14th Dist.] 2001, pet. denied).

Appellants' counsel has reasonable grounds to believe that this case could be reversed. There is a *de novo* review of the errors and they largely involve questions of law on constitutional issues. *See* Appellants' Reply Brief filed almost contemporaneously with this response and Appellants' Brief.

Appellants have plead, raised, and proved at least three affirmative defenses that shield them from any defamation liability. Those defenses are opinion, substantial truth, and fair comment. *See id.*

Even if the Court does not agree with an advocates position, the test is whether the advocate had reasonable grounds to believe he might have some success on appeal. Appellants' counsel believes his clients can and should prevail.

Appellee suggests that there is a contempt order that is dispositive of this case. He is mistaken. As reflected in the order denying Appellants' Motion to Dismiss (which is attached as Appendix 1 to Appellants' brief), the trial court issued a discovery sanction in paragraph 2. (CR:3286)[Appendix 1]). The discovery sanction merely relieves the Appellee of the burden he could not otherwise establish under Tex. Civ. Prac. & Rem. Code §27.005(c). The Appellants have not challenged the Trial Court's abuse of discretion on the

discovery issues. Instead, Appellants are proceeding under Tex. Civ. Prac. & Rem. Code §27.005(d) because the higher courts have *de novo* review and there are questions of law regarding the defenses that mandate the dismissal of Appellee's defamation claims. Appellants expect to ultimately prevail, and accordingly, sanctions have no place in this case.

Opposing counsel has also suggested that the undersigned has violated Tex. Disciplinary R. Prof'l Conduct Rule 3.03(a)(1). (Appellee's Motion for Sanctions at 3).

> **Rule 3.03 Candor Toward the Tribunal**
> (a) A lawyer shall not knowingly:
> (1) make a false statement of material fact or law to a tribunal;

Appellants' counsel has not knowingly made any false statements to this Court or any other Court in his 35 years of practice. Lawyers can disagree on what the law is or should be. Lawyers can disagree on the meaning or applicability of cases, statutes, or evidence. Lawyers can make mistakes or errors or just misconnect. But the accusation of intentionally making a false statement to a Court is completely without merit.

Since opposing counsel has brought up the subject of false statements made to this Court, Appellant informs the Court that there have been false statements (in fact, false certifications) made by the Appellee to this Court in this case that are troubling.

1. On page 17 of Appellee's Motion for Sanctions, he states in the certificate of conference section that:

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with Appellants' counsel about the merits of the motion and confirmed Appellants oppose the motion.

MARK D. BANKSTON

This certificate is completely false. There has been no conference between counsel on Appellee's motion for sanctions. Most of us take certificates of conference seriously, and it is with good reason that such conferences are mandated by the Court. (Tex. R. App. P. §10.1(a)(5). For this fatal flaw alone, motions are denied. It is certainly possible that had there been a conference, perhaps the Parties could have clarified, stipulated, or otherwise solved some or all of the issues. There are sound reasons requiring lawyers to talk. A certification to this Court that both counsel had conferred, or otherwise discussed the motion, when there had been no conference or discussion is a false statement (certification) of material fact made to the Court.

2. Opposing counsel made false certifications to this Court that he served the undersigned lead counsel with his motion for sanctions and his Appellee's brief. He did not.

Opposing counsel did not serve either his brief or his motion for sanctions on the lead appellate counsel despite signing a Certificate of Service that he did so.

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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MARK D. BANKSTON

The undersigned had to independently discover and retrieve Appellee's filings. Only after the undersigned had had enough and called opposing counsel out did opposing counsel belatedly send "courtesy" copies of the filings via regular email. Of course, by then, the filings had already been retrieved directly them from the Court.

Those are the false statements (certifications) made to this Honorable Court.

I. THE RECORD IS COMPLETE.

Appellants believe the record is complete. In fact, when sorting through this record, it was determined that none of the thumb drives had made their way to the Court in this appeal. Once located, Appellants' Motion to Transfer was filed with this Court and it is believed that the Court has a complete record. If not, Appellants will not oppose supplementing the record so that it is complete.

II. THE DISCOVERY SANCTION IS NOT DISPOSITIVE OF THIS CASE.

Appellee states that the discovery sanction that was part of the order denying the motion to dismiss is dispositive of this case. The discovery sanction is not dispositive of this case.

As reflected in the order denying Appellants' Motion to Dismiss (which is attached as Appendix 1 to Appellants' brief), the trial court issued a discovery sanction in paragraph 2. (CR:3286)[Appendix 1]). Appellee is in error. The

discovery sanction merely relieves the Appellee of the burden he could not otherwise establish under Tex. Civ. Prac. & Rem. Code §27.005(c). The Appellants have not challenged the Trial Court's abuse of discretion on the discovery issues. Instead, Appellants are proceeding under Tex. Civ. Prac. & Rem. Code §27.005(d) because the higher courts have *de novo* review and there are questions of law regarding the defenses that mandate the dismissal of Appellee's defamation claims. *See* Appellants' Reply Brief and Appellants' Brief.

III. THE DATE OF OWEN STROYER'S BROADCAST IS JUNE 25, 2017.

Appellant Shroyer conducted a live broadcast on Sunday, June 25, 2017. (CR:734, fn.67, CR:1391,¶4 [Shroyer Affidavit, Appendix 7]). The Court is asked to take judicial notice that June 25, 2017 was a Sunday and June 26, 2017 (the date professed by Appellee) was a Monday. Appellant Shroyer's first sentence on the show in question was "This is Sunday broadcast of the Alex Jones Show." (CR:1104 [Appendix 4, at p.2]).

Appellee is suing Appellant Shroyer for the republications of a portion of the June 25, 2017 broadcast that was posted on Free Speech Systems, LLC's website, www.infowars.com on June 26, 2017, and was rebroadcast on July 20, 2017. Appellant Shroyer is a reporter who obviously has nothing to do with the rebroadcasts that took place on June 26, 2017 and July 20, 2017.

IV. APPELLANTS' REPUBLICATION ARGUMENT HAS NOT BEEN WAIVED.

Appellee incorrectly suggests that Appellants never raised the republication argument and it has been waived.

Appellants plead Appellee's republication (CR:2046); raised the issues in the Motion to Dismiss (CR:2006-2008 [Defendants' First Supplemented Motion to Dismiss under TCPA]), and submitted evidence of the republications. (CR:810, ¶23 & 24; CR:955 [thumb drive of NBC broadcast with Appellee and his attorney, Mr. Bankston]; CR:809, ¶20 & 21, CR:941[thumb drive of the MSNBC broadcast with Appellee and his other attorney,Mr. Ball], CR:948-950 [transcript of the MSNBC Republication]).

Three days after he filed the lawsuit, on April 19, 2018, Appellee and his lawyers appeared on at least two nationally-televised news shows where he consented to, authorized, or invited the republication, to millions of people, of the broadcast he alleges is defamatory.

Appellee appeared on the Today Show, again with reporter-host Megyn Kelly, the reporter who was the subject of the June 25 and July 20, 2017 broadcasts. (CR:955[video]; CR:956-961[transcription]). Megyn Kelly re-played some of Appellant Jones's statements on the show. *See* (CR:948). Appellee's lawyer said what Appellee and the lawyer hoped to accomplish was "to shut down his [Jones'] hateful rhetoric." (CR:949).

On the same day, Appellee appeared on MSNBC and again republished part of the broadcast. (CR:947 [video]; CR:948-950 [transcript]).

So contrary to Appellee's representation to the Court, Appellee's republication three days after he filed this lawsuit has been plead, raised in the motion to dismiss, and the republications have been submitted as evidence.

V. INFOWARS, LLC SHOULD BE DISMISSED.

Infowars, LLC should be dismissed, along with the other Appellants, for the reasons set forth in Appellants' Brief and Appellants' Reply Brief.

VI. APPELLANTS' CONSTITUTIONAL DEFENSES HAVE BEEN PRESERVED.

Appellee suggests that Appellants have waived constitutional arguments. (Appellee's brief 56-58). Appellee is incorrect.

The purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely"…. Tex. Civ. Prac. & Rem. Code §27.002. Appellants answer raises constitutional defenses. (CR:2044-2795). Appellants' Motion to Dismiss specifically discussed the First Amendment to the United States Constitution and cited *New York Times v. Sullivan*, 376 U.S. 254 (1964), *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988), and other United States Supreme Court cases in this context. (CR:740-755). It should serve as no surprise that the Appellants are relying upon the protections of the First

Amendment in this case. Contrary to Appellee's argument in this brief, there has been no waiver of the constitutional challenges in this case.

VII. SUBSTANTIAL TRUTH IS A VIABLE DEFENSE.

The Parties disagree on this point. *See* Appellants Reply Brief at I.B. Briefly, Appellants are completely protected by Tex. Civ. Prac. & Rem. Code §73.005.

Free Speech Systems, LLC broadcasts content over the internet, radio, and television, and operates an online newspaper with video and print articles at www.infowars.com. The June 26, 2017 rebroadcast Appellee complains about was a video and print article that could be found at www.infowars.com, and the July 20, 2017 was rebroadcast live. Appellee has judicially admitted that Appellants have radio and web-based news programming. (CR:3173,¶3), and they refer to Appellants as broadcasters and describe Appellants' news programming as "broadcasts." (CR:3173-3190 [Plaintiff's Third Amended Petition]; CR:3175,¶14, CR:3176,¶15, CR:3186,¶¶55, 56, & 57).

The Court need look no further than and can take judicial notice of www.infowars.com to see the online newspaper with video and print articles. Notwithstanding this, Appellee has incorrectly suggested that Appellants are not a newspaper or broadcaster and are not entitled to protections afforded by Tex. Civ. Prac. & Rem. Code §73.005. (Appellee's brief 19-20). Appellee's comments are

without merit and inconsistent with his judicial admissions, common knowledge, and a review of www.infowars.com. *See* Appellants' Reply Brief at I.B.

Additionally, Appellee incorrectly suggests that *Avila v. Larrea*, 394 S.W.3d 646, 657 (Tex.App.—Dallas 2012, pet. denied) has been reversed for the proposition cited by Appellants. There has been no reversal of the holding cited by Appellants. Tex. Civ. Prac. & Rem. Code §73.005 provides a strong and viable defense for the Appellants

VIII. THE TROUBLING COMMENTS.

This is a delicate case. The Appellee sued for comments made on rebroadcasts that one would have had to either search out at www.infowars.com website and click to view, or happen to catch the rebroadcast on July 20, 2017.

No doubt the name of the school itself causes an upsetting reaction for the Appellee. But as a father of three sons, and as delicately as I know how to say it, the broadcasts and rebroadcasts are the subject matter of the Plaintiff's Petition, and necessarily, they have to be quoted and discussed. The spin Appellee's counsel places on everything probably does not help in this regard.

IX. APPELLANTS ARE SEEKING RELIEF FROM THE ATTACKS ON THEIR FIRST AMENDMENT RIGHTS IN THE SWIFTEST WAY PROVIDED BY THE RULES.

Appellee complains that previous Appellate counsel perfected an interlocutory appeal in 2018. Apparently, it was believed that the motion to dismiss was denied by operation of law and that if an appeal had not been perfected, the opportunity to appeal would have been lost.

This Court ultimately determined that there was no denial of the motion to dismiss by operation of law and the appeal was dismissed for want of jurisdiction. *Jones v. Heslin*, 587 S.W.3d 134 (Tex.App–Austin 2019, no pet.). It appears former Appellate counsel was in error, but did not risk waiving his clients' right based on confusion. The case went back down to the trial court, an order denying the motion to dismiss was signed, and this appeal timely perfected. It may be important to note, that Appellee's counsel filed a motion for sanctions in the case no. 03-18-00650-CV, *Jones v. Heslin* case too.[1]

The reason Appellee's counsel sought sanctions in that appeal was because Appellants requested this Court expedite a ruling. The Court is requested to take judicial notice of its file in case no. 03-18-00650-CV, and in particular, Appellants' Motion to Expedite and Appellee's response and motion for sanctions.

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[1] These are the only two motions for sanctions this lawyer can recall seeing filed in any appellate court.

Appellants take this case, and the other 4 cases brought by Plaintiff counsel very seriously. Appellants are trying to get relief from the attacks on their First Amendment rights as quickly as possible.

CONCLUSION AND RELIEF REQUESTED

Appellants request that the motion for sanctions be denied and for such other and further relief to which Appellants may be justly entitled.

February 18, 2020

Respectfully submitted,

/s/ David J. Sacks

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this *Appellants' Response to Motion for Sanctions* was filed electronically and served on all counsel below via electronic service through an electronic filing service provider on this 18th day of February, 2020:

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