CAUSE NO. 03-15-00614-CV

In the Court of Appeals
For the Third Court of Appeals District
Austin, Texas

INFOWARS, LLC, FREE SPEECH SYSTEMS, LLC, AND KIT DANIELS,
Appellants,

v.

MARCEL FONTAINE,
Appellee.

Expedited Appeal from the 53rd Judicial District Court, Travis County
Hon. Scott H. Jenkins, Presiding

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

On April 2, 2018, Appellee Marcel Fontaine filed his petition against Appellants InfoWars, LLC, Free Speech Systems, LLC, and Kit Daniels (hereinafter, collectively, "InfoWars") asserting causes of action for defamation and intentional infliction of emotional distress, while pleading conspiracy and respondeat superior as derivative forms of recovery. [CR 4]. Appellee also brought claims against Alex Jones which are not at issue in this appeal.

On June 5, 2018, Appellants filed a Motion to Dismiss under the Texas Citizens' Participation Act. [CR 81]. The trial court held a hearing on the Motion to Dismiss on August 2, 2018, and it entered an Order on August 29, 2018 granting in part and denying in part the Motion. [CR 314]. On September 17, 2018, Appellants filed their Notice of Appeal. [CR 316].

STATEMENT REGARDING ORAL ARGUMENT

While the legal issues presented in this appeal are not complex, the factual background is somewhat esoteric, involving internet media and fringe internet communities. Therefore, Appellee agrees that oral argument could benefit the Court in understanding the series of events giving rise to Appellee's claim.

ISSUES PRESENTED

1. Whether the Appellee produced *prima facie* evidence that InfoWars LLC participated in the publication of the allegedly defamatory content.

2. Whether the Appellee produced *prima facie* evidence supporting his defamation claims.

3. Whether the trial court acted within its discretion in awarding attorneys' fees upon dismissal of Appellee's claim for intentional infliction of emotional distress.

STATEMENT OF FACTS

I. Introduction

InfoWars printed a reckless and dangerous article in the hours following the shooting at Douglas High School in Parkland, Florida. In the article, InfoWars published a photograph of Plaintiff Marcel Fontaine and claimed that it depicted the alleged Parkland shooter. [CR 173]. It did so based on an anonymous message posted to 4chan.org, a disturbing and infamous website which is notorious for its hoaxes. [CR 94; 168].

Not did InfoWars know the source was extraordinarily untrustworthy, but even the most basic diligence would have revealed that the anonymous message was a cruel and stupid joke, and that Mr. Fontane had been subject to harassment on the 4chan website for days prior to the shooting. Anonymous neo-Nazi internet users had been making fun of a photograph of Mr. Fontaine wearing a novelty t-shirt which made a visual pun on the phrase "communist party" by depicting communist historical figures drinking at a party:

For InfoWars, the prospect of publishing of an image of the Parkland shooter wearing a communist-themed t-shirt was so tantalizing that it used Appellee's picture despite knowledge that it was false or with reckless disregard for the truth. After InfoWars legitimized Appellee's image to its enormous audience, it rapidly spread across the internet during the evening of the shooting and for weeks afterward. [CR 15-16].

Not only was Appellee's image spread across the world as a mass murderer, but internet users soon revealed his personal details using the same image-searching tools InfoWars failed to employ before publishing. [CR 169]. InfoWars' later allegations that the event was a staged "false flag" led some to believe that Mr. Fontaine was somehow involved in a conspiracy. [CR 16-19]. Mr. Fontaine was sent violent threats, including a threat that referenced his place of employment. [CR 162]. Given the harassment, death threats, and violence suffered by other individuals who

were drawn into InfoWars' conspiracies, Mr. Fontaine remains in fear for his safety. [*Id*].

InfoWars' history is littered with the fallout from its reckless false accusations posing as hard news. InfoWars is known for claiming that the 9/11 attacks were an inside job and for insisting for years that the Sandy Hook massacre was a government hoax using actors. [CR 6]. InfoWars' history of spreading fake stories leading to the harassment of innocent victims is fully described in Appellee's petition. [CR 6-9]. Despite becoming notorious for its fake news, the InfoWars brand now reaches an astounding audience. The InfoWars website alone receives more than 30 million page-views per month, to say nothing of its social media accounts and third-party video channels. [CR 10]. Despite the size of its audience, InfoWars refuses to implement the most basic journalistic safeguards, leading to the consistent publication of false information and ensuing harassment.

II. The February 14, 2018 Publication

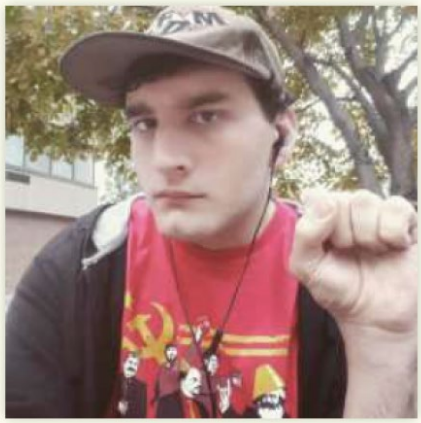
The title of InfoWars' February 14, 2018 article read: "*Reported Florida Shooter Dressed as Communist, Supported ISIS*." [CR 173]. The InfoWars article did not attribute the image to any third party, nor did the article report any statements made by a third party. The use of Mr. Fontaine's image in the InfoWars' article is shown below:

REPORTED FLORIDA SHOOTER DRESSED AS COMMUNIST, SUPPORTED ISIS

MSM already covering it up

Kit Daniels | Infowars.com - FEBRUARY 14, 2018 746 Comments

And another alleged photo of the suspect shows communist garb:



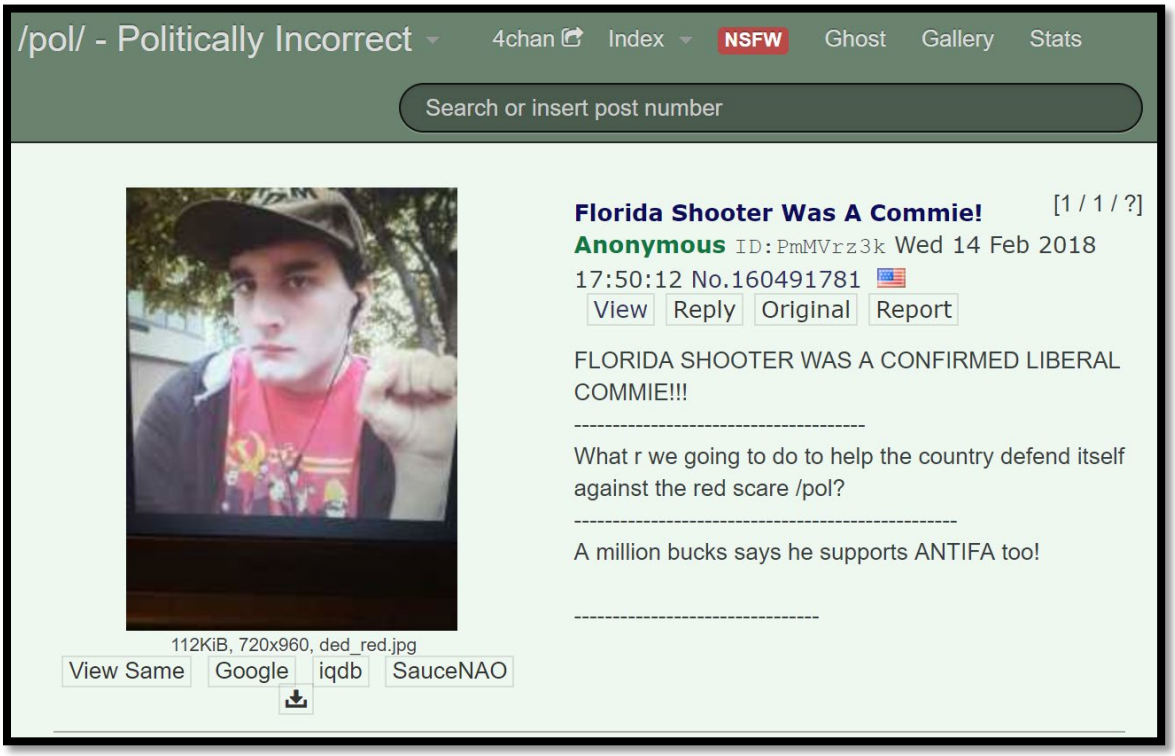
R: **0**

Shooter is a commie:
REEEEEEEEEEEEE

InfoWars reporter Kit Daniels claims to have found the image on the website 4chan.org. [CR 94]. According to the affidavit of Fred Zipp, who was the twenty-year managing editor of *The Austin American-Statesman*, 4chan is "an anonymous discussion forum with a history for fakery and internet trolling." [CR 168]. 4chan is difficult to describe to those unfamiliar with the website's sordid history. It began as a discussion forum where users could post comments and images anonymously. It soon grew into ground zero for the internet's most disgusting filth, whether it be neo-Nazi hate speech, child pornography and pedophilia, or online harassment and fakery

of every kind. As the Sixth Circuit noted, "a key component of the culture of 4chan consists of anonymous posters making claims that are not in fact true." *United States v. Kernell*, 667 F.3d 746, 752 (6th Cir. 2012). The Sixth Circuit warned that "[e]ven more so than most anonymous tips, statements made on 4chan have no indicia of reliability." *Id.* at 751.

One troubling aspect of InfoWars' defense is that it never actually reveals the original source of the image used in its article, merely noting that Mr. Daniels saw it on 4chan. In its TCPA Motion, InfoWars provided the following archived copy of a message posted on 4chan on February 14, 2018 [CR 97]:

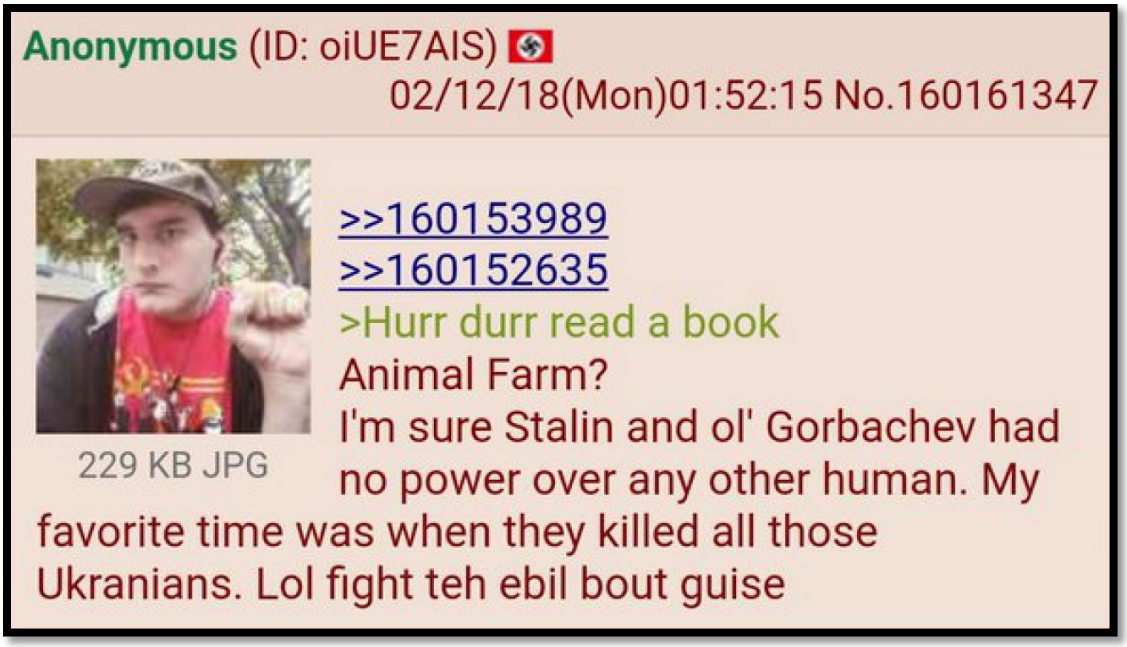


Yet it is important to note that this 4chan post is *not* the message from which Mr. Daniels acquired the image. The time-stamp on the message is after the

publication of the InfoWars article (and quite likely inspired by it). InfoWars admits that it cannot produce the original source, but it claims that "[t]he original poster of the "thread" on the 4Chan Website that contained the Image identified the individual in the image as the Parkland, Florida shooter." [Appellant's Br. 6]. Yet there is no evidence of the "original post" or what its content might have been.[1]

What is known is that there was never a real allegation that Appellee Fontaine was the Parkland shooter. As Fred Zipp showed in his affidavit, the 4chan message was not a genuine allegation, but part an act of ongoing mockery directed at Mr. Fontaine that had been taking place on the website. [CR 168-169]. In the four days before the Parkland shooting occurred on February 14, 2018, users on 4chan had been posting Mr. Fontaine's picture with mocking comments. [*Id*]. On February 10, Mr. Fontaine's image was posted in response to a person asking users to "show me your worst unironic lefty dimwits, commies, etc., you've found while surfing the internet/social media." [*Id*]. In another thread posted to the website on February 12, an anonymous 4chan user with a Nazi icon posted Mr. Fontaine's image again in a mocking message:

[1] The origin of the image is further complicated by InfoWars' retraction, which conflicts with Mr. Daniels' declaration. InfoWars' retraction states that "[InfoWars] had received" the image. Mr. Daniels claims in his declaration to have found it on his own.



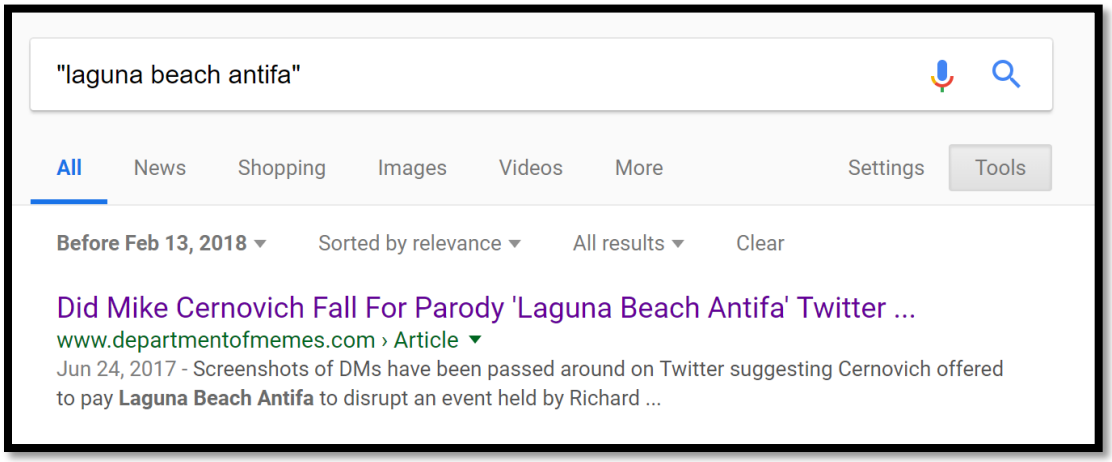
Mr. Zipp noted that almost immediately after InfoWars' article was published, social media users and commenters on InfoWars.com were pointing out that the use of a "reverse image search" – the most basic tool of photo verification – revealed that Mr. Fontaine's photo had been mocked by users on 4chan for days before the shooting even happened. [CR 169]. In other words, a reverse image search would have shown that the appearance of Mr. Fontaine's image on 4chan was part of ongoing harassment by neo-Nazi trolls. "Trolling refers to the practice, common on 4chan and other internet sites, of deliberately posting incorrect or inflammatory content for the purpose of eliciting a reaction from other users." *Kernell,* 667 F.3d at 753. In short, this was not a bona fide accusation, and a simple search would have revealed as much.

Mr. Daniels also stated that he saw the image from 4chan shared on social media. InfoWars points to this message posted to Twitter by anonymous user @LagBeachAntifa7, which is an obvious joke [CR 117]:

Not only is the text an obvious joke (Why would "Antifa" tweet out a photo it did not want shared?), but according to Mr. Zipp, the anonymous Twitter account "Laguna Beach Antifa" is a known internet troll with a documented history of hoaxes.[CR 170-171].[2] Mr. Zipp noted that a simple Google search would have revealed this fact, since four of the top of results on February 13, 2018 for "Laguna

[2] This anonymous Twitter account pretends to be a local "chapter" of the Antifa movement. Antifa is a term for a conglomeration of unorganized, self-styled anti-fascist groups in the United States. This anonymous Twitter account posts inflammatory content or hoaxes to discredit or mock Antifa. The abbreviation "RT" stands for "re-tweet," meaning to share the message on Twitter.

Beach Antifa" were articles noting the account posted false information. A cursory review of the content on this Twitter account would have made this obvious as well.



Above: The first Google result as of February 13, 2018 [CR 171].

As Mr. Zipp states, "the 'Laguna Beach Antifa' tweet was not a serious message or genuine allegation. It was an obvious bad joke by an anonymous internet troll." [CR 171]. Nonetheless, InfoWars made the choice to publish Mr. Fontaine's image to its enormous audience while asserting that it was an alleged photo of the Parkland shooter. The next morning, InfoWars quietly removed the image from the article, but Mr. Fontaine's photo continued to spread for weeks.

III. Appellee's Lawsuit

Appellee Fontaine requested a retraction, but InfoWars ignored the request until Appellee served a copy of his lawsuit. [C.R. Response 13]. Upon being sued, InfoWars issued a retraction. Shortly thereafter, InfoWars filed a Motion to Dismiss under the Texas Citizens' Participation Act.

InfoWars' Motion argued that accusing an innocent man of mass murder based on an anonymous message from the gutter of the internet while never revealing its source was part of its "constitutionally protected rights to comment about a matter of public concern." [CR 82]. InfoWars' argument would eviscerate all existing defamation law. Any statement or image could be published so long as it was posted to an anonymous forum prior to publication. Indeed, there would be nothing to stop an InfoWars writer from submitting his own anonymous message to 4chan and then republishing that statement to millions with no attribution. While InfoWars would welcome this sort of anarchy, the law of defamation will not abide it.

ARGUMENT

I. Standard for TCPA Motions

The Texas Citizens' Participation Act (TCPA) requires a court to consider the pleadings and supporting and opposing affidavits filed by the parties before ruling on a motion to dismiss. Tex. Civ. Prac. & Rem. Code §27.006(a). To survive dismissal, the nonmoving party must establish by "clear and specific evidence a prima facie case for each essential element of the claim." Tex. Civ. Prac. & Rem. Code § 27.005(c).

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). In *Lipsky,* the Supreme Court interpreted "clear and specific evidence" to mean more than "mere notice pleading." *Id.* "Though the TCPA initially demands more information about the underlying claim, the Act does not impose an

elevated evidentiary standard or categorically reject circumstantial evidence." *Id.* at 591. As such, the Supreme Court "disapprove[d] those cases that interpret the TCPA to require direct evidence of each essential element of the underlying claim to avoid dismissal." *Id.* Instead, "pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss." *Id.* Appellee far exceeded this burden, producing direct *prima facie* evidence on each element of his claim.

II. Appellee Fontaine Produced *Prima Facie* Evidence that InfoWars, LLC Published the Defamatory Article.

Appellant contends that Appellee failed to produce any evidence which ties InfoWars, LLC to the defamatory publication. However, Appellee produced an affidavit from a member of Appellee's counsel's staff who accessed and printed a copy of the "Terms of Use" section of the InfoWars.com website where the defamatory article was published. [CR 214-62]. The affidavit also includes an identical copy of the website saved to Archive.org on February 13, 2018. [*Id*].

The document is titled "INFOWARS LLC, TERMS OF USE & PRIVACY POLICY." [CR 243]. The document states, "'We,' 'us,' and 'our' means Infowars, LLC, a Texas limited liability company." [CR 245]. The document provides that "by using InfoWars.com" [CR 260], the user makes certain agreements with InfoWars, LLC.

In response to the plain text on its website, InfoWars goes so far as to accuse Appellee of impropriety, telling this Court that "Appellee sought to manufacture

evidence" on this point. [Appellant's Br. 19]. Yet there is nothing manufactured about InfoWars, LLC's own statements on the InfoWars.com website. InfoWars next claims that the affidavit must be ignored because Mr. Turnini is not an expert. Yet Mr. Turnini was testifying to his personal observations; he visited a website and printed the contents he personally viewed. As for the content of the website, the text speaks for itself. InfoWars next argues that Appellee's counsel conceded there was "a very ambiguous record" on this point. Yet InfoWars does not provide the full quotation. Appellee's counsel noted there was "a very ambiguous record *in terms of what the defendants have said*. And the only evidence in this case now is from the website that specifically put [InfoWars, LLC] on." [RR 56].

Last year in *Warner Bros.*, this Court endorsed the evidence offered here by Appellee Fontaine. In *Warner Bros.*, this Court examined whether the plaintiff "established a *prima facie* case of publication by the various corporate defendants." *Warner Bros. Entm't, Inc. v. Jones*, 538 S.W.3d 781, 801-802 (Tex. App.—Austin 2017, pet. filed). Like here, the plaintiff offered the "Terms of Use" website which "contained a list of The Warner Bros. Entertainment Group of Companies." *Id.* The Terms of Use website "named 21 companies, including one called 'TMZ Productions Inc.'" *Id.* Like here, the Terms of Use identified the defendant company as "'we,' 'our,' 'us'." *Id.*

In response, the defendant, like here, produced an affidavit from an employee who "testified that he had personal knowledge about the corporate structure of the various defendants" and "disclaimed responsibility for publication by three of the six

defendants." *Id.* at 802. However, this Court held that the "inconsistency between the website's public disclosures and [the employee's] interested testimony precludes us from viewing his testimony as conclusive proof that TMZ Productions, Inc. did not publish the article." *Id.* at 803. Moreover, the court noted that "[a]n action is sustainable against a corporation for defamation by its agent," and that "[n]either express authorization nor subsequent ratification is necessary to establish liability." *Id.* at 802. Therefore, the court found that plaintiff's evidence "suffices to establish a *prima facie* case that the corporate defendants published the information on the TMZ website." *Id.* at 802. The same is true here.

III. Appellee Established a *Prima Facie* Case for Defamation.

InfoWars attacks various elements of Appellee's claim for defamation, but Appellee has offered *prima facie* evidence that InfoWars maliciously published an article capable of a defamatory meaning and that Appellee suffered damages as a result. Moreover, InfoWars' defense of substantial truth is based on a willful misrepresentation to this Court, and it is also precluded by InfoWars' admission that the published matter was erroneous.

A. Appellee produced *prima facie* evidence of actual malice, and by extension, mere negligence.

First, InfoWars argues that because "Appellee plead and argued only actual malice," there can be no finding of negligence. [Appellant's Br. 23]. However, pleading reckless conduct encompasses mere negligent conduct, as it is a more severe lack of

care. A reckless, malicious act is necessarily also a negligent act. Appellee's counsel addressed this issue at oral hearing with a common analogy:

> The other argument that I've been hearing is that because the plaintiff has attempted to show you clear and specific evidence of actual malice, that therefore we haven't been able to prove negligence. And the way I had always viewed that and the way I had always learned about it is that if I'm going to try to prove gross negligence, I have proved negligence in the process. I have overflowed the cup. If I have the cup of negligence and I keep pouring reckless acts into it till it overflows into reckless and gross conduct, then I have also proved negligence. [RR 96].

In any case, InfoWars' conduct supports actual malice because InfoWars published the image with reckless disregard. "To establish reckless disregard, [Plaintiff] must provide sufficient evidence that the publisher entertained serious doubts as to the truth of his publication." *Warner Bros.,* 538 S.W.3d at 805.

1. InfoWars showed an abject lack of care.

In assessing actual malice, a court should "begin by noting the gravity of the accusations made against [plaintiff]." *Id.* The article in *Warner Bros.* concerned an allegation of attempted murder based on unattributed statements of an unnamed third-party. This Court noted that "[c]harges as serious as the ones leveled against [plaintiff] in this article deserve a correspondingly high standard of investigation." *Id.* at 806. Here, the charges are even more serious. Indeed, it is difficult to imagine any allegation more serious than accusing an individual of mass murder in a school shooting. Fred Zipp explained the issue based on his decades of experience at *The Statesman*:

> Publishers must take into account the significance of a news event when considering the consequences of a false accusation. The consequences of a false accusation are enormous when the event is subject to global attention. The desire to report as rapidly as possible on a breaking news event does not change a publisher's obligation to report only the facts and to avoid making false accusations of criminal conduct. [CR 166].

Mr. Zipp's affidavit discussed the process of photo and content verification in journalism, and he explained why Mr. Daniels showed a complete lack of care far beyond mere negligence. During this discussion, Mr. Zipp cited an industry publication entitled *Verification Handbook: An Ultimate Guideline on Digital Age Sourcing for Emergency Coverage*, which outlines the steps reporters take to ensure they "confirm the image is what it is labeled/suggested to be showing." [CR 166]. Mr. Zipp also discussed the steps a publisher must employ when dealing with "user-generated content," which is "content produced by a member of a social network for other members of the network." [CR 167].

While Appellee will not belabor all of these steps here, Mr. Zipp noted that a publisher must "start from the assumption that the content is inaccurate or been scraped, sliced, diced, duplicated and/or reposted with different context." [*Id*]. Reporters must take steps to "identify and verify the original source and the content." [*Id*]. They must "triangulate and challenge the source." [*Id*]. When verifying user-generated content, they should "always gather information about the uploaders, and verify as much as possible before contacting and asking them directly whether they are indeed victims, witnesses or the creator of the content." [*Id*]. None of that

happened here. InfoWars showed a complete and intentional lack of care. Like the defendant in *Bentley,* InfoWars "ignored elementary precautions." *Bentley v. Bunton,* 94 S.W.3d 561, 593 (Tex. 2002).

Yet even all these reckless failures would have been avoided had Mr. Daniels performed the single most basic step of photo verification – a reverse image search using "a service like Google Reverse Image Search or TinEye." [*Id*]. Citing the *Verification Handbook*, Mr. Zipp notes that "pre-existing images that have been misattributed (perhaps the most common form of 'fake') can often be debunked in a few seconds through a reverse image search." [*Id*]. Indeed, several readers of Mr. Daniels' article debunked the photo almost immediately, and they posted comments about the results of reverse image searches. [CR 169].

Importantly, Mr. Zipp also noted that Kit Daniels "was aware of reverse image searching, as he included a link to a reverse image search in a story he wrote on November 5, 2016, entitled *Read Hillary Emails to Find Child Rape Evidence*." [CR 169]. In addition, Mr. Zipp discussed a prior incident when InfoWars was criticized for not performing a reverse image search before publishing a similar erroneous photo. [CR 170]. The fact that InfoWars did not perform any verification steps or even a reverse image search "supports an inference that [Defendants] purposefully avoided inquiring into the details." *Warner Bros.,* 538 S.W.3d at 808. InfoWars' conduct goes beyond mere negligence, as even the most basic precautions were utterly disregarded.

2. InfoWars relied on obviously dubious statements.

"Statements made on information that is obviously dubious may show actual malice." 8A Tex. Jur. Pl & Pr. Forms § 157:6 (2d ed.). Such is the case here, where InfoWars relied on an anonymous 4chan message, a source of information which is obviously dubious. As the Sixth Circuit warned, "a key component of the culture of 4chan consists of anonymous posters making claims that are not in fact true." *Kernell*, 667 F.3d at 752. "Even more so than most anonymous tips, statements made on 4chan have no indicia of reliability." *Id.* at 751. These findings are also supported by the affidavit of Brooke Binkowski, the managing editor of Snopes.com. As part of her work, Ms. Binkowski has "become very familiar with the website 4chan.org," and she is "also very familiar with InfoWars, who often propagate the false stories debunked on [her] website." [CR 185]. Ms. Binkowski described 4chan as follows:

> 4chan.org is a website that has come to represent the worst of Internet culture. Its visitors frequently create and disseminate violent racist and misogynistic content that they use for purposes of "trolling" and "shitposting" (two Internet culture words that are employed in a variety of ways but in this context means using disinformation and smears to harass and bully people online…[4chan's] most notorious channel, /pol/, has become a gathering place for white supremacists to discuss or plan events and create and spread hoaxes. 4chan's reputation for hoaxes and false information is well known among journalists and online culture. [CR 185-186].

According to Mr. Zipp, that reliability problem is at its worst during national tragedies:

> In fact, 4chan's reputation for fakery during national tragedies became so bad that Forbes published an article on October 3, 2017, entitled "Google Needs to Blacklist 4chan During National Crises." Noting how 4chan is "the Internet's own Lord of the Flies island," the article explains how "[t]heir community actively seeks to spread misinformation, especially during mass shootings." The article notes that the users of 4chan "have been engaging in this type of online sabotage for over a decade." [CR 168].

Mr. Zipp also states he "reviewed materials which indicate that Mr. Daniels personally understood 4chan's reliability problem." [*Id*]. For example, on August 24, 2017, Mr. Daniels wrote an article for InfoWars entitled "BBC Falls Victim to 4chan Trolling – MSM Caught Sounding Like Idiots." [*Id*]. Mr. Daniels mocked the BBC, writing that the "BBC claims visiting 4Chan constitutes 'investigative journalism.'" [*Id*].


BBC FALLS VICTIM TO 4CHAN TROLLING – MSM CAUGHT SOUNDING LIKE IDIOTS

BBC claims visiting 4Chan constitutes "investigative journalism"

Kit Daniels | Infowars.com - AUGUST 24, 2017 226 Comments

Likewise, Ms. Binkowski testified that "InfoWars articles and videos frequently refer to 4chan. I have no doubt that InfoWars reporters are aware of 4chan and aware of its reliability problems." [CR 186]. Ms. Binkowski also testified that "[e]ven ignoring 4chan's notorious history of fakery, publishing an image from any anonymous message board with no meaningful corroboration of its accuracy violates absolutely every standard of care I have applied throughout my 23-year career in journalism." [*Id*].

InfoWars cites to *Cox v. Penick*, claiming that reliance on dubious sources is no evidence of malice. InfoWars misreads *Cox*. In that case, the plaintiff relied on "a statement by Davis McAuley, editor of *The Bastrop Advertiser,* that he believed Fisher [a source] was untrustworthy." *Cox Texas Newspapers, L.P. v. Penick,* 219 S.W.3d 425, 441 (Tex. App.—Austin 2007, pet. denied). This statement was McAuley's personal belief. Importantly, the court noted that McAuley did not testify the source was "so untrustworthy that it would be reckless for anyone to believe him." *Id.* In addition, there was no evidence that "that appellants were aware of Fisher's lack of trustworthiness and chose to ignore it or purposefully avoided the truth." *Id.* Both of these circumstances are present in this case. Mr. Zipp testified that "any competent journalist would know there are obvious reasons to doubt the veracity of an anonymous 4chan post," and Mr. Zipp also testified that "Mr. Daniels personally understood 4chan's reliability problem." [CR 168].

InfoWars attached a declaration from Mr. Daniels claiming that he acted in good faith, but the Texas Supreme Court wrote that proof of actual malice cannot be defeated with the defendant's self-serving protestations of sincerity. *See Bentley v. Bunton,* 94 S.W.3d 561, 596 (Tex. 2002). A defendant cannot "[e]nsure a favorable verdict by testifying that he published with a belief that the statements were true." *Id.* In *Bentley*, the Court noted that a defendant's "[p]rofessions of good faith will be unlikely to prove persuasive, for example, where a story…is based wholly on an unverified anonymous telephone call." *Id.* "Nor will they be likely to prevail when the

publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." *Id.* Both circumstances are present here.

3. This Court's decision in *Warner Bros.* applies with equal force in this case.

This Court's decision last year in *Warner Bros.* is especially pertinent to this case. In *Warner Bros.,* this Court examined a TMZ article about Robert Jones, a Dallas Cowboys linebacker. *Warner Bros.,* 538 S.W. 3d at 790. The article stated that Mr. Jones was alleged as a suspect in a plot to hire a hitman. *Id.* "TMZ's source for the article was Theodore Watson, Jones's first cousin and a convicted felon." *Id.* at 789. Based on statements Watson made to TMZ, which were not attributed to Watson in the article, TMZ asserted Mr. Jones was "the primary suspect in a police investigation." *Id.* at 790.

In response, "the TMZ Defendants assert[ed] that they were merely reporting the allegations made by Watson." *Id.* at 807. However, this Court noted "that the Texas Supreme Court has reaffirmed the well-settled legal principle that one is liable for republishing the defamatory statement of another." *Id.* at 810. When a publication is based on the allegations made by an unnamed third-party, the court held that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* at 806, *citing Harte-Hanks*, 491 U.S. at 688. In *Warner Bros.*, "[t]he TMZ Defendants [did] not dispute that no one investigated Watson to determine whether he was a credible source." *Id.* at 807. The

reporter "testified that she did not know whether Watson was a stalker or whether he was mentally unstable." *Id.* at 808.

In this case, the situation is even worse. InfoWars knows literally nothing about its unnamed source on 4chan. And as pointed out by the Sixth Circuit, "[e]ven more so than most anonymous tips, statements made on 4chan have no indicia of reliability." *Kernell,* 667 F.3d at 751. This is case is no different than an InfoWars reporter walking into a gas station restroom, seeing graffiti that reads "For a Good Time, Call Jane Smith," and then reporting to millions that Jane Smith is alleged to be a prostitute. Indeed, gas station graffiti is probably more reliable than the malicious anonymous trolls on 4chan.

Publishing anonymous accusations without attribution is not a defense; it is evidence of actual malice. *See, e.g., Bentley,* 94 S.W.3d at 596 (finding actual malice when statement was "based wholly on an unverified anonymous telephone call."); *see also* 1 Law of Defamation § 3:62 (2d ed.) ("[R]eliance on an anonymous source…is admissible as evidence of actual malice."). Even now, InfoWars cannot name any individual whose statement it claims to have reported. InfoWars merely cites "the original poster" of the anonymous 4chan message, which has somehow disappeared. For all we know, the "original poster" could be Mr. Daniels himself.

Like the defendants in *Bentley*, InfoWars "failed to meaningfully seek corroboration." *Bentley v. Bunton,* 94 S.W.3d 561, 593 (Tex. 2002). Indeed, their only corroboration was an anonymous Twitter message that was obviously a joke.

InfoWars was not merely negligent; it "ignored elementary precautions." *Id.* Even worse, the conduct appears to be motivated by a desire to avoid the truth. Because there is ample evidence to support a finding of actual malice, these facts more than support Appellee's burden to defeat a motion to dismiss.

B. The Zipp and Binkowski Affidavits provide substantive evidence supporting a finding of actual malice.

InfoWars' next claim of error stems from complaints about the affidavits of Fred Zipp and Brooke Binkowski. First, InfoWars complains about "allegations concerning prior publications" in the affidavits. [Appellant's Br. 28] However, the analysis of prior publications was necessary to show that 1) InfoWars was acutely aware of the accuracy problems of 4chan, and 2) InfoWars had mocked other media outlets for relying on 4chan content, and 3) InfoWars was familiar with "reverse image searches," the most basic step of image verification. These prior publications are relevant because actual malice can be shown "from the defendant's words or acts before, at, or after the time of the communication." *Warner Bros.*, 538 S.W.3d at 805. These actions need not be focused on Mr. Fontaine. "[A]ctual malice concerns the defendant's attitude toward the truth, not toward the plaintiff." *Freedom Newspapers of Texas v. Cantu,* 168 S.W.3d 847, 858 (Tex. 2005).

InfoWars also complains about "Zipp's conclusion that Daniels entertained serious doubts about the accuracy of the Image." [Appellant's Br. 29]. Naturally, Mr. Zipp cannot know what Mr. Daniels was thinking, but Appellee is entitled to prove his case through circumstantial evidence. The trial court specifically noted Mr. Zipp's

opinion that no competent publisher would act as InfoWars did under these circumstances:

> THE COURT: But have they made a case or at least stated evidence that survives dismissal that using [4chan] at all for a journalist is running through a red light with sirens and, you know, like a railroad signal? I mean, you just wouldn't do it. No self-respecting journalist would use this site is what I'm reading…That it's such an incendiary, you know, unreliable pool of, you know, discredit that you just wouldn't do it; nobody would do it. I'm going to go back and read the Zipp affidavit.
>
> MR. TAUBE: Sure.
>
> THE COURT: But that's what I'm understanding he says.
>
> MR. TAUBE: That is what --
>
> THE COURT: You just wouldn't touch this thing.
>
> MR. TAUBE: That's what he says. [RR 105-106].

In addition, Mr. Zipp also considered Mr. Daniels' complete lack of care, noting that he took no measures whatsoever to verify his story. As Appellee's counsel later told the Court, "Your Honor, try to imagine what steps, if any, Mr. Daniels took -- at all -- of any care that he took to make sure that this was the right photo, and there isn't any." [RR 96]. Here, the circumstances cited by Mr. Zipp give him reason to conclude that InfoWars avoided the truth.

InfoWars finally complains about Ms. Binkowski's affidavit, claiming that her testimony should be ignored because she "did not affirm that she ever reviewed or even saw the Image or that she had any other personal knowledge about it."

[Appellant's Br. 30]. However, Ms. Binkowski's affidavit did not directly opine about the content of the InfoWars article. Rather, Ms. Binkowski testified to her personal knowledge of 4chan, as well as her personal knowledge of InfoWar's familiarity with 4chan's accuracy problem. [CR 194].

C. Appellee set forth *prima facie* evidence of falsity.

When examining a publication's meaning, the court must determine if the plaintiff's interpretation is "a reasonable construction of the article's gist." *D Magazine Partners, L.P. v. Rosenthal,* 529 S.W.3d 429, 441 (Tex. 2017), *reh'g denied* (Sept. 29, 2017). Here, a reasonable interpretation of the article's gist is that that InfoWars had obtained a photograph of the suspected Parkland High School shooting suspect. Yet Mr. Fontaine was not involved or actually suspected in the Parkland shooting. [CR 162]. There had never been any actual allegation that he was the shooter, only an anonymous internet prank that was misrepresented by InfoWars with no attribution. [CR 168].

Falsity has been repeatedly applied to "wrong photo" cases. Courts have universally recognized that a cause of action will lie when "the newspaper used the wrong picture but correctly identified the name of the [actual suspect]." *Cheney v. Daily News L.P.,* 654 Fed. Appx. 578, 581 (3rd Cir. 2016). This has been the law in Texas for over one hundred years, starting with *James v. Fort Worth Telegram Co.,* 117 S.W. 1028 (Tex.Civ.App.1909), and reaffirmed in the many cases cited in Appellee's response. [CR 138-143]. InfoWars does not challenge this line of cases. Instead,

InfoWars claims it is immune from suit because it accurately reported a third-party's allegations. However, as shown below, there are numerous problems with this argument.

1. InfoWars' defense of substantial truth is based on a willful misrepresentation.

InfoWars' argument in support of a "substantial truth" defense is stunningly dishonest. InfoWars claims that the trial court erred "by not dismissing Appellee's defamation cause of action based upon Appellant's statutory truth defense under Section 73.005." [Appellant's Br. 32]. InfoWars tells this Court that it is entitled to the defense because it is "a newspaper or other periodical or broadcaster who accurately reports a third-party allegation regarding a matter of public concern." [*Id*].

InfoWars' counsel has intentionally misled this Court and knowingly violated their duty of candor. InfoWars is not a newspaper, periodical, or broadcaster. This subject was discussed on the record at the hearing. [RR 47-53]. InfoWars knows it carries the burden to prove its defense, but it offered no evidence that it is a newspaper, periodical, or broadcaster. In truth, InfoWars knows it does not qualify for the defense.

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" is well defined in the law, and "comprises magazines, trade publications, and scientific and academic journals

with weekly, monthly, or quarterly circulation and does not necessarily include other publications with such circulation even where the publications are published at regular intervals." *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); *see also Oxford English Dictionary Online*, at http://www.oed.com (defining periodical as "a magazine or journal issued at regular or stated intervals (usually weekly, monthly, or quarterly)"). "The United States Postal Service uses a similar definition of 'periodical' to determine mailing rates." *Goguen*, 234 F.R.D. at 18. InfoWars does not meet this definition.

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). The definition in common usage likewise refers to an entity who transmits a television or radio signal. InfoWars does not broadcast any signals over public airwaves. Instead, InfoWars produces video and audio content, and it provides that content to other entities for distribution. It also publishes webpages, as it did in this case. These matters were raised before the trial court, and InfoWars had no response. [RR 47-53].

Despite the fact that both parties fully understand that InfoWars cannot meet the statute, InfoWars dishonestly chose to tell this Court that it is entitled to legal

protection as a newspaper, periodical, or broadcaster. [Appellant's Br. 32]. On October 25, 2018, Appellee's counsel wrote to counsel for InfoWars as follows:

> Your brief to the Court of Appeals argues that the trial court "erred by not dismissing Appellee's defamation cause of action based upon Appellant's statutory truth defense under Section 73.005." Your brief tells the Court that your clients are entitled to "a defense for a newspaper or other periodical or broadcaster who accurately reports a third-party allegation."
>
> You and I both know that none of your clients is a newspaper, periodical, or broadcaster, but your brief intentionally misleads the Court to believe the opposite is true and that your clients are entitled to this defense. Your brief violates your duty of candor to the Court and advances a legal argument based on a knowingly false representation.
>
> Please let me know what steps you will be taking to ensure the Court understands that your representation was erroneous. [Addendum 1].

In response, InfoWars' counsel refused to correct the record, and stated that "we stand by the arguments that we have made to the Court of Appeals." [Addendum 1]. Despite having the burden of proof on its own defense, InfoWars' counsel further asserted that Appellee Fontaine had "the right to fully develop the evidence necessary to argue what [he] appears to be arguing here." [*Id*]. InfoWars' counsel did not explain why Appellee would need to develop evidence on InfoWars' defense. Nonetheless, based on no evidence, and contrary to what InfoWars' counsel knows to be true, InfoWars told the Court of Appeals it is entitled to the defense as a newspaper, periodical, or broadcaster.

Because InfoWars cannot show it is one of the three specified entities described in the statute, the video is governed by the common law framework. Tex. Civ. Prac. & Rem. Code § 73.005 was created as an exception for certain defendants to the Supreme Court's decision in *Neely,* which affirmed 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. Applying that framework last year, this Court wrote that "we note that the Texas Supreme Court has reaffirmed the 'well-settled legal principle that one is liable for republishing the defamatory statement of another.'" *Warner Bros.,* 538 S.W.3d at 810.

Ignoring *Neely*, InfoWars emphasizes Daniels' use of the term "alleged" in the text as some kind of shield or disclaimer of liability. However, "merely printing 'it is alleged' did not absolve the defendant of liability: An accusation purporting to rest on hearsay is none the less defamatory." *Rouch v. Enquirer & News of Battle Creek*, 137 Mich. App. 39, 57, 357 N.W.2d 794, 804 (1984), *aff'd and remanded*, 427 Mich. 157, 398 N.W.2d 245 (1986); *see also Lancour v. Herald & Globe Ass'n*, 111 Vt. 371, 380, 17 A.2d 253, 257 (1941) ("The fact that the charge was qualified by the words 'it is alleged' or their equivalent, does not absolve the defendants from responsibility for publishing it. An accusation purporting to rest on hearsay is none the less

defamatory…The principle is of long standing. It was applied in *Meggs v. Griffith*, 1595 Cro.Eliz. 400."). The only allegation the reader carries away is the allegation from InfoWars.

In sum, the InfoWars article was not a neutral report on a third-party and their allegations. Instead, it was the publication of a dubious hearsay rumor from an anonymous source with no attribution. Even if InfoWars was a newspaper, periodical, or broadcaster, it is impossible to determine if InfoWars accurately reported a third-party's allegations because InfoWars is unable to produce its source. Yet the point is moot because InfoWars is not a newspaper, periodical, or broadcaster, and it remains liable for publishing a defamatory allegation of a third-party.

2. InfoWars' retraction under Section 73.057(b)(1) precludes a defense based on truth.

InfoWars published a retraction so that it could claim the benefit of Tex. Civ. Prac. & Rem. Code Sec. 73.055 and limit Appellee's ability to recover damages. InfoWars issued a retraction under Section 73.057(b)(1), which is an admission that the complained of publication was not truthful. Having made that retraction, InfoWars is precluded from pleading truth as a defense. On May 18, 2018, InfoWars served notice of its intent to rely on its retraction. The retraction admits that InfoWars "stated incorrectly that it was an alleged photo of the suspected shooter." [CR 77]. Therefore, the retraction was a "publication of an acknowledgment that the statement specified as false and defamatory is erroneous." Tex. Civ. Prac. & Rem. Code 73.057(b)(1).

InfoWars claims that the statute cannot be read on plain terms because "defamation defendants would be compelled *not* to publish retractions for fear of their adverse legal effect in any subsequent litigation." [Appellant's Br. 32]. Yet if InfoWars had intended to disclaim the statement based on a third-party's allegation, the statute provided a method for them to do so without admitting falsity.

If InfoWars had intended to rely on a retraction of a third-party's statement, it would have been required to issue a different retraction under Sec. 73.057(b)(3). For a third-party allegation, a retraction must be "a statement attributed to another person whom the publisher identifies and the publisher disclaims an intent to assert the truth of the statement." *Id.* In this case, InfoWars' retraction did not identify any third party, and it did not disclaim an intent to assert the truth of the statement. Rather, the retraction admits that InfoWars made its own incorrect statement, and the statement was removed. Since InfoWars has already admitted the erroneous nature of its publication and claimed legal benefit, it is estopped from asserting the defense of truth.

IV. Appellee Produced *Prima Facie* Evidence of Damages.

InfoWars first agrees that Appellee Fontaine is entitled to a presumption of general damages if there is *prima facie* evidence of actual malice. [Appellant's Br. 32]. However, even without actual malice, Appellee's affidavit defeats a motion to dismiss. The record shows that Appellee has suffered compensable mental anguish from being accused of mass murder to millions of people. Mental anguish is compensable "if it

causes a 'substantial disruption in...daily routine' or 'a high degree of mental pain and distress.'" *Hancock v. Variyam,* 400 S.W.3d 59, 68 (Tex. 2013), *quoting Parkway,* 901 S.W.2d at 444**.** In *Beaumont v. Basham*, 205 S.W.3d 608, 617 (Tex. App.—Waco 2006, pet. denied), mental anguish damages were found when the plaintiff testified that there was a lot of whispering about her, she changed some of her daily routine, suffered anxiety attacks and insomnia, and was constantly thinking about what had occurred. There is also evidence of mental anguish where a plaintiff "sought medical treatment." *Hancock,* 400 S.W.3d at 69.

All of these circumstances are present in this case. Mr. Fontaine testified to the following in his affidavit:

> The extreme shock, stress, embarrassment, and fear from this incident caused a major disruption in my daily routine. For the first several weeks, everyone who knew me was talking about it. Even though many of them meant well, I couldn't go anywhere or talk online without the incident coming up. Because of this, I started avoiding social settings, and my life became more isolated.
>
> I generally tried to avoid looking at the things being said online as my picture was being passed around after the InfoWars article. But it was everywhere. I've seen hundreds of violent, hateful messages posted online. I have seen messages from people wishing me dead even after being told of my real identity. And I've personally been sent violent and harassing messages which continued even weeks later, including a threat which referenced my place of employment.
>
> After my photo spread across the internet, I have seen blogs, social media messages, and images posted online by individuals who appear to believe I am part of a conspiracy to stage the Florida shooting. I saw an individual online

> post a facial comparison to claim that I am an actor who "played" Nikolas Cruz. I am terrified that InfoWars fans may come to similar conclusions, and that they may seek to confront me or do me harm over the coming years. I am aware this has happened to other individuals who became a part of a conspiracy theory popularized by InfoWars.
>
> As a result of these fears, my sleep became highly irregular, and I continue to suffer from severe insomnia. This also disrupted my usual routine. I've been having frequent nightmares about a confrontation with an InfoWars fan. When walking in public places, I found myself having severe panic attacks at the thought of those nightmares coming true.
>
> I feel like having my image exposed to the world as a mass murderer has forever changed me. My demeanor has become more anxious and less trusting. It is also interfering with my personal relationships. Because my severe anxiety and fear over this incident shows no sign of going away, I decided to seek therapy to help address these issues. [CR 162-163].

Mr. Fontaine's affidavit, which describes the high degree of mental pain and distress he suffered after being identified as a mass murderer, creates *prima facie* evidence in support of his claim of mental anguish.

V. Appellee's Conspiracy Claim is Purely Derivative of his Defamation Claim.

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

> The tort is derivative because "a defendant's liability for conspiracy depends on participation in some

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

Warner Bros., 538 S.W.3d at 813–14. (citations omitted); *see also Price v. Buschemeyer*, 12-17-00180-CV, 2018 WL 1569856, at *8 (Tex. App.—Tyler Mar. 29, 2018, pet. filed)("[C]ivil conspiracy is derivative tort to defamation-type claims.").

In short, a plaintiff need only prove the *prima facie* elements of the underlying tort, not the derivative theories of recovery. Cases dismissing conspiracy claims can be distinguished either by the conspiracy claim alleging conduct apart from the underlying claim, or by the court's simultaneous dismissal of the underlying claim. Conspiracy claims should only be dismissed under the TCPA if the primary claim fails or if the conspiracy claim alleges acts and omissions independent from the primary claim.

VI. The Trial Court Acted Within its Discretion in Awarding Attorneys' Fees.

InfoWars claims the trial court erred in its award of attorneys' fees because Appellee Fontaine failed to "object that Appellants had failed to segregate their fees." [Appellant's Br. 38]. In truth, Appellee's counsel repeatedly objected to the

unsegregated fees and argued that the amount devoted to the emotional distress claim was minimal:

> MR. BANKSTON: But I don't believe that there was any significant amount of the gravity of this motion, of this ten-page motion that they did that revolves around intentional infliction that has much of a gravity to that.
>
> THE COURT: Well, there was some.
>
> MR. BANKSTON: They did. They researched some cases, absolutely. And I'll pay for that research if it turns out you think I don't have that claim…
>
> So what I'm saying, Your Honor, is that when you're determining the fees, you've got to understand they filed an affidavit and they're claiming over $60,000 in fees. Again, I'll make the same statement I made to you yesterday.[3] That amount is just obscene…
>
> Now, I think if you do have to *try to isolate what is worth what*, I think you do have to see in that Motion when is intentional infliction, what did it take to write the one sentence that says Alex Jones didn't have anything to do with this, what is the reasonable value of that, because I'll submit to you it's not much. It's a pretty small number. We do object to the amount of the affidavit in terms of we don't believe that those are reasonable attorneys' fees. We think the rate is too high. We think the hours are too high. We don't think from what they've stated that that amount should be anywhere close to that much. [RR 71-73; *see also* RR 75:16].

Later in the hearing, Appellee's counsel again argued for segregation of the fees:

[3] On the previous day, Appellee's counsel argued a similar TCPA motion in *Pozner v. Jones, et al* regarding InfoWars statements about Sandy Hook parents. That lawsuit is also currently on appeal to this Court.

> Your Honor, I do believe that you're right, that no matter how I walk out of here today, I walk out with some sort of chip being taken off my shoulder. And if that's the case, I think what we really have to do is look at those fees, look at what the different parts of this motion are and what happened. The primary allegation and weight of the original TCPA Motion is not these peripheral things. The weight of what [InfoWars] had to do to respond does not address these peripheral things. But I will concede to you that if there are some small issues in this case that would require a small award of fees, those may be if my defamation claim is granted. [RR 94-95].

Thus, Appellee made "a complaint regarding the failure to segregate" by objecting "during the testimony in support of attorney's fees." *In the Interest of M.G.N.*, 491 S.W.3d 386, 410 (Tex. App.—San Antonio 2016). Thus, Appellee provided "the opposing party the opportunity to segregate the fees." *Id.* InfoWars did not do so, and the trial court was within its discretion segregate on a reasonable basis. In evaluating that award, it should be noted that below is the entirety of InfoWars' Motion addressing Appellee's emotional distress claim, consisting of two sentences:

> Second, to prove an intentional infliction of emotional distress, a plaintiff must establish that (1) the defendant acted intentionally and recklessly, (2) the defendant's conduct was extreme and outrageous, (3) the defendant's actions caused the plaintiff emotional distress, and (4) the emotional distress was severe. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006). Plaintiff cannot provide "clear and specific" evidence of a prima facie case of each of these elements of his intentional infliction of emotional distress claim. [CR 88-89].

The trial court's award of attorneys' fees under these circumstances was reasonable and fair.

CONCLUSION

InfoWars printed a reckless and dangerous article, and it did so with absolutely no journalistic verification. Those facts would be bad enough, but here it relied on a source so patently unreliable that it justifies an interference that InfoWars simply did not care about the truth. Appellee demonstrated every element of his claim, and InfoWars has no valid defense. For these reasons, Appellee prays this Court affirms the ruling of the trial court and remands this action for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limit of Tex. R. App. P. 9.4(i)(2)(B) because the brief contains 8,844 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

MARK D. BANKSTON

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2018 the forgoing document was served upon all counsel of record via electronic service.

MARK D. BANKSTON