*ORAL ARGUMENT REQUESTED*

NO. 03-18-00603-CV

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

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ALEX E. JONES, INFOWARS, LLC AND FREE SPEECH SYSTEMS, LLC

*APPELLANTS*

v.

LEONARD POZNER AND VERONIQUE DE LA ROSA

*APPELLEES*

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ON APPEAL FROM CAUSE NUMBER D-1-GN-18-001842
345TH DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. SCOTT JENKINS PRESIDING

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# APPELLANTS' INITIAL BRIEF

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## STATEMENT OF THE CASE

Plaintiffs, Leonard Pozner and Veronique DeLaRosa, originally sued defendants for defamation based on an April 22, 2017 broadcast, remarks after an April 28, 2017 press conference and a June 18, 2017 NBC/Megyn Kelly interview of defendant Jones. Plaintiffs are the parents of a child who was killed in the December 2012 mass shooting at the Sandy Hook Elementary School in Newtown, Connecticut. Defendant Alex Jones is an electronic media figure well-known for his opinions on Second Amendment rights and government and media dissemination of misinformation and concealment of truth. Jones is the sole member of defendants Infowars, LLC and Free Speech Systems, LLC.

Defendants filed a timely motion to dismiss under Tex. Civ. Prac. & Rem. Code §27.003[1] and amended their answer to assert affirmative defenses.[2] The parties filed affidavits[3] in support of their respective positions and defendants filed objections to plaintiffs' affidavits.[4] Late on the afternoon before the hearing, plaintiffs filed an amended petition[5] from which they dropped all claims regarding the June 18 NBC broadcast and in which they added a new allegedly-defamatory June 13 broadcast. Plaintiffs also added claims for intentional infliction of

[1]CR:438-826
[2]CR:45
[3]CR:1406-1476,2186-2192
[4]CR:496-826;834-1181;1406-1476;1504-1508;2186-2192
[5]CR:830;1479-1503

emotional distress (IIED).

Though defendants filed two formal requests for rulings on their previously filed objections and objected to the district court's refusal to rule[6], the court did not rule on defendants' objections.

An order denying defendants' motion was entered.[7]

This is an accelerated appeal from the order denying defendants' motion as permitted under Tex. Civ. Prac. & Rem. Code §51.014(a)(12).

[6] C.R.2238-2241,2310-2313
[7]CR:2307

## STATEMENT REGARDING ORAL ARGUMENT

Appellants Alex E. Jones, Infowars, LLC and Free Speech Systems, LLC request oral argument.

Application of the law to the facts is a challenge in that the facts are unique. Oral argument would benefit the Court.

Of overarching import is that constitutional rights are implicated. In such cases, each party should be allowed the fullest possible opportunity to present their respective positions.

## ISSUES PRESENTED

I. Whether the trial court erred in finding that defendants failed to establish by a preponderance of the evidence that plaintiffs' *entire lawsuit* is based on, related to, or in response to defendants' exercise of constitutionally protected rights;

II. Whether the trial court erred in finding that defendants failed to establish by a preponderance of the evidence that *each individual cause of action* asserted by plaintiffs is based on, related to, or in response to defendants' exercise of constitutionally protected rights;

III. Whether the trial court erred in finding that each plaintiff established by clear and specific evidence, a prima facie case for each element of each cause of action asserted against each defendant for each broadcast;

IV. Whether the trial court erred in finding that defendants failed to establish by a preponderance of the evidence each element of a valid defense; and

V. Whether the trial court erred in refusing to sustain defendants' timely written objections to plaintiffs' evidence notwithstanding defendants' formal requests to rule on those objections.

## STATEMENT OF FACTS

Plaintiffs DeLaRosa and Pozner, suffered an unthinkable tragedy on December 14, 2012, losing their son at Sandy Hook.[8]

In the immediate aftermath, many questioned the events and posited that events were either faked or being misrepresented and used by government officials and mainstream media to push for gun control.[9]

Less than a month later, a video called "the Sandy Hook Shooting-Fully Exposed" had received 10 million views on Youtube.[10] Claims that Sandy Hook was a hoax "spread…like wildfire…."[11] Plaintiffs believe there are "tens of thousands" of Sandy Hook "cult followers" and that "groups" have used social media to "hunt" them.[12]

### A. Plaintiffs' Previous Circumstances

Plaintiffs' harassment began immediately after DeLaRosa's January 2013 testimony before the Connecticut legislature supporting gun control.[13]

Before Jones' April 22 statements, plaintiffs stated that they had been harassed and abused by many other hoaxers and conspiracy theorists and "attacks

[8]CR:1480,¶9
[9]CR:141,208-213
[10]CR:238
[11]CR:2089
[12]CR:2090
[13]CR:1133-1134,¶¶5,13

on us [plaintiffs'] began" almost immediately after the shootings.[14] "Since that day...we have been embroiled in a constant battle…to protect us from harassment and threats."[15] Plaintiffs "have endured online, telephone, and in-person harassment, abuse, and death threats."[16] In order to protect themselves, plaintiffs have had to "relocate numerous times."[17] They believe that their "families are in danger as a direct result of the hundreds of thousands of people who believe the lies and hate speech…"[18] Plaintiffs described their situation as "horrific" and say they have suffered "bewildering attacks" since the shootings.[19] They believe "many of these tormenters persecute [them] behind anonymous online identities…" [20] In the years since the shooting, Pozner has multiple PO boxes and un-named utility accounts to confuse conspiracy fanatics and both plaintiffs have had to move several times.[21]

Plaintiffs have spoken out many times about the aggressive harassment.[22] They have been "subjected to a relentless barrage of false claims and conspiracy theories-including that the shooting was a hoax and the victims were 'crisis

[14]CR:1351
[15] CR:2089
[16] CR:1354
[17] CR:2090
[18] CR:2090
[19] CR:2090
[20] CR:141
[21] CR:1130,¶10;1135,¶27
[22] CR:1351

actors'"[23] Pozner doesn't believe that Jones is among the most prolific of the hoaxers as he previously sued them or caused their removal.[24] In 2017, Pozner stated that he has "battled with online platforms hosting hoaxer content for nearly five years" and described it as a "tumultuous" experience.[25] He stated he has "tormentors"[26] and has been "targeted".[27] Pozner stated there are "tens of thousands" of "cult followers" who are "malicious" and who "are being reached and indoctrinated…every day."[28] After Pozner was questioned by a Florida police detective about his own internet posts, he filed a complaint because of the detective's treatment of him and claims this "triggered" his PTSD.[29]

**B. Plaintiffs' public activities**

Immediately after the tragedy, plaintiffs gained national attention regarding Sandy Hook, the debates on gun control[30] and whether Jones and others with similar opinions should be limited or banned from public platforms.[31]

DeLaRosa entered the national public debate over gun control.[32] She addressed the Connecticut legislature urging a ban on certain weapons saying,

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[23] CR:1354
[24]CR:1389
[25]CR:672
[26]CR:673
[27]CR:1366
[28]CR:672
[29]CR:134
[30]CR:236-240
[31]CR:1401-1403

"[T]he only way I feel I can bring some purpose to [her son's death] is by speaking on the issue of gun control."[33]

DeLaRosa also spoke publicly at a rally outside the Connecticut State Capital.[34] Amidst signs demanding safer, rational gun laws, she told the crowd: "Assault weapons should be comprehensively banned in …[.] They have no place in the hands of civilians[.] Citizens may have the right to bear arms but they do not have the right to bear weapons of mass destruction."[35]

On Newtown Action Alliance Facebook's page, in a long list of posts expressing a desire for gun control, DeLaRosa asked: "…why no progress on guns?"[36]

DeLaRosa became "one of the most vocal Newtown parents, giving interviews with CNN's Anderson Cooper and… *People Magazine.*"[37] Her words influenced Connecticut's legislature, as it later "passed the strictest gun control laws in the nation…"[38] DeLaRosa's online profile acknowledges the fact that she is no longer a private individual.[39]

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[32]CR:540
[33]CR:832
[34]CR:639
[35]CR:160
[36]CR:145
[37]CR:540
[38]CR:541
[39]CR:541

DeLaRosa led her family's push for reforms from the White House[40] and made recommendations to its task force.[41] She also testified before the Connecticut panel on gun control stating that "[A]ssault weapons should be comprehensively banned [as] tools of mass carnage…such weapons have no place in our society."[42]

"[S]he kept Newtown and gun control on the national agenda."[43] Her public role in this debate is evidenced by a google search of the term "Veronique Pozner gun control" which resulted in 580,000 articles.[44]

Since Sandy Hook, Pozner has dedicated his life to defending the facts surrounding Sandy Hook against "conspiracy theorists" and "hoaxers" questioning them.[45] His mission, to "force hoaxers into alternative avenues to express these extreme and harmful ideas,"[46] has become "his life's work."[47] He established www.honr.com, and has posted numerous articles describing his "fight."[48] One article refers to his public participation and five-year personal crusade against conspiracy theorists and doubters.[49]

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[40]CR:542
[41]CR:544,1374-1375
[42]CR:548-551
[43]CR:541
[44]CR:504,¶30
[45]CR:236-240
[46]CR:511
[47]CR:1718
[48]CR:628-629
[49]CR:520-523,1389

Part of this public fight involves using his experience in information technology to scrub internet content, file copyright claims, sue hoaxers and petition a university to fire a professor who was a "hoaxer."[50] Pozner has also given numerous interviews on major networks regarding his participation in the "fight" against "hoaxers."[51] Nearly a year before he filed suit, Pozner's fight became focused on Jones who Pozner noted "is undeniably newsworthy" because of his relationship to the President.[52]

His participation in the gun control debate is illustrated by a Google search of his name and "gun control" that yields nearly 40,000 articles.[53]

Pozner believes that plaintiffs have been targeted because DeLaRosa spoke publicly about gun control.[54]

**C. The lawsuit**

Defendant Jones is the host of radio and web-based news programming, "The Alex Jones Show." He owns the website Infowars.com.[55] Jones' primary business is the reporting of news and providing commentary and opinions.[56] His

[50]CR:524-529
[51]CR:637,672-673
[52]CR:672-673
[53]CR:504,¶30
[54]CR:1389
[55]CR:1479-1480,¶4
[56]CR:1170,¶22

Youtube channel has more than two million subscribers and has received 1.3 billion views.[57]

Jones did not start any controversy or theory about Sandy Hook.[58] Before Jones first commented on any issues relating to Sandy Hook, others with whom he had no affiliation had already posted online articles claiming a hoax and questioning events.[59]

Plaintiffs' original defamation claims were based on Jones' commentary in an April 22, 2017 broadcast, an April 28, 2017 press conference, and a Megyn Kelly interview of Jones broadcast by NBC on June 18, 2017.[60] On July 31, 2018 plaintiffs amended their petition and dropped all claims related to the June 18 NBC broadcast but added claims relating to a June 13, 2017 broadcast and new claims of intentional infliction of emotional distress (IIED).[61]

On April 22 Jones stated his belief that CNN has historically used "green" screens during broadcasts to fake locations. He showed part of an interview conducted by Anderson Cooper where DeLaRosa briefly appeared without audio.[62] In the video, Cooper's nose temporarily disappeared as he turned his head. Jones

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[57]CR:1170,¶22
[58]CR:121-122,1338-1340,1343-1344,¶2
[59]*Id.*
[60]CR:2052-2053,¶62-65
[61]CR:1496-1499,¶62-65
[62]CR:786-787;789-790

attributed that to anomalies that occur when using a blue-green screen.[63] DeLaRosa didn't speak and wasn't identified. Jones' commentary focused on and was specifically directed toward CNN.[64]

Pozner is not shown, mentioned, referenced or identified in the April 22, 2017 broadcast.[65]

On Aprils 28 Jones did not mention or refer to either plaintiff.[66]

Plaintiffs didn't produce a video or accurate transcript of Jones' entire remarks on June 13 and the record doesn't reflect that Jones mentioned either plaintiff .[67]

On June 18, NBC broadcast Kelly's interview of Jones airing less than 18 minutes of the 10 hours of the actual video interview.[68] The portion of Jones' interview that was aired was taken out of context and edited by NBC to increase ratings.[69] This was a publication by NBC, not defendants. Again, Jones didn't mention either plaintiff.[70]

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[63]CR:1343-1344,¶2
[64]CR:397-398;1056-1060;1061-1065
[65]*Id.*
[66]CR:2062,2063-2086
[67]CR:1067-1071
[68]CR:469-470,¶2
[69]*Id.*
[70]CR:1172-1182

This claim was dropped by plaintiffs before the hearing when they amended their petition.[71]

### D. The hearing and objections

At the hearing, plaintiffs agreed that the TCPA applied to their lawsuit and that it was based on defendants' exercise of free speech.[72] Plaintiff also agreed that the April 28 and June 13 statements would not, on their own, survive dismissal.[73]

During the hearing, the trial judge obtained plaintiffs' counsel's agreement that no further documents would be filed.[74] The judge also stated that the record for it to review would include the filings up until the day of the hearing.[75] The judge stated the record was then closed except for a letter from counsel confirming that what they had already sent to be filed was in fact in the court's file.[76] The court took the parties' objections under advisement.[77] After the hearing, plaintiffs filed supplemental declarations to which defendants timely objected. When the court had not ruled on defendants' objections, defendants filed two formal requests for rulings.[78] The court did not expressly rule.

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[71]CR:1496-1501
[72]RR:107:12-15
[73]RR:69:8-17
[74]RR:75:16-76:4
[75]RR:98:1-6
[76]RR:159:13-160:1,164:20-166:7
[77]RR:164:6-19
[78]CR:2238-2241,2310-2313

### E. The evidence

None of the plaintiffs' affidavits/declarations reference any causation or damages regarding any broadcast other than the April 22 broadcast.[79] None of the affidavits references the April 28, June 13 or June 18 broadcasts.[80] Plaintiffs didn't submit transcripts or videos of the complete broadcasts of April 28 or June 13, but included only selected excerpted transcripts.[81]

[79]CR:1130-1131,¶¶13-17,1135,¶¶22-29,2176-2177,2178-2179
[80]CR:896-921,1115-1118,1129-1131,1144-1148,1120-1127,1133-1136,1138-1139,1141-1142
[81]CR:1349,¶14

## SUMMARY OF ARGUMENT

The denial of defendants' TCPA motion should be reversed because after defendants established the TCPA applied to plaintiffs' entire case and each separate claim, plaintiffs failed to produce clear-and-specific-evidence for each essential element of their claims and defendants proved their defenses.

Of the four defamation claims plaintiffs brought, they non-suited one and didn't attempt to provide evidence of two others, instead admitting that these two could not survive dismissal on their own. The remaining April 22 broadcast is not defamatory for six reasons.

1. Jones' unambiguous textually-explicit-statements, implication or gist aren't capable of defamatory meaning.

2. Jones' statements are not capable of the defamatory meaning that plaintiffs' allege. No reasonable viewer after watching the entire broadcast would infer that Jones' criticisms of CNN accused plaintiffs of engaging in criminal fraud to cover-up of the truth regarding Sandy Hook and the death of their child.

3. Defendants' statements are not "of and concerning" either plaintiff. Although DeLaRosa is briefly shown in the video displayed during Jones' criticism of CNN and Cooper, Pozner is not shown or referenced at all in that or any of the other allegedly-defamatory broadcasts. Likewise, DeLaRosa is not mentioned in any other broadcast.

4. Plaintiffs cannot use innuendo to transform Jones' non-defamatory statements.

5. Because Jones' statements were not defamatory per se, plaintiffs were required to, but did not show, clear-and-specific-evidence of the existence and amount of pecuniary damages.

6. Plaintiffs failed to establish proximate cause. They began experiencing harassment from Sandy Hook "hoaxers" immediately after the tragedy and have been targeted for years. These pre-existing continuous circumstances required plaintiffs to link their damages to defendants' statements and exclude other causes. They were also required to show how their pecuniary damages were foreseeable to Jones' when he criticized CNN. Plaintiffs provided clear-and-specific-evidence of neither the but-for-element nor foreseeability element of proximate cause.

Finally, the trial court should have dismissed the suit because defendants proved each of their defenses.

## ARGUMENT

The TCPA "protects citizens who… speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them"[82] and "professes an overarching purpose of 'safeguard[ing] the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government" against infringement by meritless lawsuits.[83] The TCPA is to be "construed liberally to effectuate its purpose and intent fully."[84] It pursues "such goals chiefly by defining a suspect class of legal proceedings that are deemed to implicate free expression, making these proceedings subject to threshold testing of potential merit, and compelling rapid dismissal--with mandatory cost-shifting and sanctions--for any found wanting."[85] "The TCPA casts a wide net," is broad and must be construed according to its plain text.[86]

Under the TCPA, the movant bears the initial burden to show by a preponderance of evidence "that the legal action[87] is based on, relates to, or is in response to the party's exercise of [certain constitutional rights]."[88]

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[82]*In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015)
[83]*Cavin v. Abbott*, 545 S.W.3d 47, 55 (Tex. App.- Austin, July 14, 2017) (emphasis added)
[84]*Cavin*, 545 S.W.3d at 55
[85]*Id.*
[86]*Adams v. Starside Custom Builders, LLC*, No. 16-0786, 2018 Tex. LEXIS 327, at *8 (Tex. 2018)
[87]Pursuant to the statute, a "legal action" can be, among others, a "lawsuit" or "cause of action." Tex.Civ.Prac.&Rem.Code §27.001(6)
[88]Tex.Civ.Prac.&Rem.Code §27.005(b)

Once the movant meets this burden, the burden shifts to the non-movant to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question" in order to avoid dismissal.[89]

Should the non-movant meet its statutory burden, the burden shifts back to the movant, who may then establish by a preponderance of the evidence each essential element of a valid defense which, if established, results in a mandatory dismissal by the court.[90]

**I. The trial court erred in finding that defendants failed to establish by a preponderance of the evidence that plaintiffs' *entire lawsuit* is based on, related to, or in response to defendants' exercise of constitutionally protected rights**

The TCPA is applicable to this litigation because: (1) plaintiffs' entire lawsuit is factually predicated on defendants' exercise of their constitutionally protected rights; and (2) plaintiffs' entire lawsuit is otherwise "based on, relates to and is in response to" defendants' exercise of their constitutionally protected rights.[91]

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[89] Tex.Civ.Prac.&Rem.Code §27.005(c)
[90] Tex.Civ.Prac.&Rem.Code §27.005(d)
[91] CR:49-82 and referenced attachments

Plaintiffs' original petition[92] included claims regarding statements on April 22, April 28 and June 18. Then the afternoon before the hearing, plaintiffs filed an amended petition, dropping the June 18 claims and asserting new claims for defamation, defamation per se, conspiracy and respondeat superior relating to a June 13, 2017 broadcast. Plaintiffs also asserted claims for IIED arising from that June 13 broadcast, a November 18, 2016 broadcast and five 2017 broadcasts on: March 8, April 22, June 18, June 26, and October 26.[93]

The trial court is required to consider the live pleading when making its determination. Because plaintiffs chose to amend prior to the hearing at which defendants sought dismissal of plaintiffs' *entire* lawsuit, the live pleading's new claims were subject to the motion. Plaintiffs intended their claims to be subject to the motion as plaintiffs' counsel argued the June 13 claim at the hearing.[94]

At the hearing and *after plaintiffs' counsel argued the new June 13 claim*[95], he conceded the TCPA ***was*** applicable to the ***entire suit***:

> So let's talk about what those elements are, the prima facie elements … because … ***we don't disagree that <u>the suit</u> implicates the TCPA***. This was an exercise of free speech. So let's look at … now it comes to us. It's now our burden.[96]

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[92] The original petition is attached as an exhibit to an affidavit at CR:1168,¶15, 1284
[93]CR:1479-1503
[94]RR:65:11-66:14
[95]RR:65:11-66:9
[96]RR:107:12-16.

Because defendants established that plaintiffs' entire lawsuit—not just each individual cause of action—is based on, related to and in response to defendants' exercise of their constitutionally protected rights, the trial court erred in finding that the TCPA did not apply to plaintiffs' entire lawsuit.

**II. The trial court erred in finding that defendants failed to establish by a preponderance of the evidence that *each individual cause of action* asserted by plaintiffs is based on, related to, or in response to defendants' exercise of constitutionally protected rights**

Defendants established the TCPA's applicability to each individual cause of action based upon the April 22, April 28, and June 18 broadcasts. Each cause of action is factually predicated on defendants' exercise of their constitutionally protected rights and each cause of action is otherwise "based on, relates to and is in response to" defendants' exercise of their constitutionally protected rights.

This Court has held that the TCPA's language, "based on, relates to, or is in response to" "serves to capture, at a minimum, a 'legal action' that is factually predicated upon alleged conduct that would fall within the TCPA's definitions of 'exercise of the right of free speech…'"[97] The term "legal action" is defined by the TCPA as a "lawsuit" or "cause of action."[98]

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[97] *Cavin*, 545 S.W.3d at 58
[98] Tex.Civ.Prac.&Rem.Code§27.001(6)

When determining whether a "legal action" is based on, related to or in response to the exercise of a constitutionally protected right, the Texas Supreme Court explains:

> [T]he plaintiff's petition…is the "best and all sufficient evidence of the nature of the action"…When it is clear from the plaintiff's pleadings that the action is covered by the [TCPA], the defendant need show no more.[99]

Plaintiffs' original[100] and amended petitions each assert claims against defendants based on exercises of protected rights. Plaintiffs didn't argue the TCPA's applicability and have conceded the TCPA applies.[101] The trial court erred in finding the TCPA was inapplicable to each individual cause of action asserted against each defendant.

**III. The trial court erred in finding that each plaintiff established by clear and specific evidence, a prima facie case for each element of each cause of action asserted against each defendant for each broadcast**

Neither plaintiff established by clear and specific evidence a prima facie case for each essential element of each claim for defamation, defamation per se,

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[99]*Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017)
[100]CR:413-430
[101]RR:107:12-16.

conspiracy, respondeat superior and IIED against each defendant for each broadcast.[102]

"The words 'clear' and 'specific' in the context of this statute have been interpreted to mean, for the former, 'unambiguous,' 'sure,' or 'free from doubt' and, for the latter, 'explicit' or 'relating to a particular named thing.'"[103] The plaintiff is responsible for "***element-by-element, claim-by-claim exactitude***."[104]

### A. Plaintiffs nonsuited all claims relating to the June 18 broadcast

A "TCPA motion to dismiss is a claim for affirmative relief and, as such, it survives the [plaintiff's] nonsuit…"[105] Plaintiffs' Original Petition asserted 22 individual claims for defamation, defamation per se, conspiracy and respondeat superior regarding this broadcast.[106] Plaintiffs nonsuited each of those claims.[107] Defendants briefed and argued to the trial court that plaintiffs' nonsuit should result in dismissal of those claims.[108]

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[102]Attached to the appendix at tab C is a table which graphically depicts each plaintiff's causes of action against each defendant
[103]*In re Lipsky*, 460 S.W.3d 579,590 (Tex.2015)
[104]*Elite Auto Body, LLC. v. Autocraft Bodyworks, Inc.*, 520 S.W.3d 191,206 (Tex.App.-Austin 2017, pet.dism'd) (emphasis added).
[105]*Lona Hills Ranch, LLC v. Creative Oil & Gas Operating, LLC*, 549 S.W.3d 839,844 (Tex. App.-Austin 2018, no pet.h.).
[106]Appendix tab C
[107]CR:1496,¶¶62-65
[108]CR:1508-1511,RR:7:20-8:2

Plaintiffs also failed to produce *any* evidence of any element of their 22 claims related to the June 18 broadcast.[109] They didn't even mention this broadcast in their affidavits/declarations and thus didn't link this as a cause of any claimed damages as required.[110]

The trial court should have dismissed those claims.

**B. Plaintiffs failed to produce clear and specific evidence for each essential element of each plaintiffs' remaining claims against each defendant for defamation per se and defamation per quod arising from April 22, 28 and June 13 broadcasts**.

Defamation is a false and injurious impression of a plaintiff published without legal excuse.[111] It requires: (1) publication of a false statement of fact to a third party; (2) that was defamatory concerning the plaintiff; (3) with the requisite degree of fault, and (4) that proximately caused damages.[112] Compensatory damages in defamation cases "must compensate for 'actual injuries' and cannot merely be 'a disguised disapproval of the defendant.'"[113]

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[109]Appendix tab C
[110] CR:896-921, 1115-1118, 1129-1131, 1144-1148, 1120-1127, 1133-1136, 1138-1139, 1141-1142.
[111]*Turner v. KTRK Television, Inc.*, 38 S.W.3d 103,115 (Tex. 2000)
[112]*Bos v. Smith*, 2018 Tex. LEXIS 524, *26 (Tex.2018)
[113]*Brady v. Klentzman*, 515 S.W.3d 878,887 (Tex.2017)

Before this court may even reach the evidentiary review, it must first determine whether each individual statement or each publication's gist is even capable of defamatory meaning by reviewing each publication as a whole.[114]

Then the threshold question is whether the statements are reasonably capable of a defamatory meaning.[115] This is a question of law.[116] Only if the answer is yes, the Court then is to "determine whether the meaning the plaintiff alleges is reasonably capable of arising from the text of which the plaintiff complains." [117] This Court must "construe the publication 'as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it,'" [118] including "accompanying statements, headlines, pictures and the general tenor and reputation of the source itself."[119]

Whether a publication is "false and defamatory" depends on a "reasonable person's perception of the entirety of a publication and not merely on individual statements."[120] To qualify as defamatory, a statement must be derogatory,

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[114] *Entravision Communications Corp. v. Salinas*, 487 S.W.3d 276,284 (Tex.App.-Corpus Christi 2016, pet.denied)
[115]*Musser v Smith Protective Services, Inc.*, 723 S.W.2d 653,655 (Tex.1987)
[116]*Hancock v. Veriyam*, 400 S.W.3d 59,66 (Tex.2013)
[117]*Dallas Morning News v. Tatum*, 554 S.W.3d 614, 625 (Tex. 2018)
[118]*D Magazine Partners, L.P.* v. *Rosenthal*, 529 S.W.3d 429,434 (Tex.2017)
[119] *Entravision*, 487 S.W.3d at 284
[120]*D Magazine Partners, L.P.*, 529 S.W.3d at 434(citing *Bentley v. Bunton*, 94 S.W.3d 561, 579(Tex. 2002); *MKC Energy Invs., Inc. v. Sheldon*, 182 S.W.3d 372, 377(Tex.App.-Beaumont 2005, no pet.)("The statements alleged to be defamatory must be viewed in their context; they may be false, abusive, unpleasant, or objectionable to the plaintiff and still not be defamatory in

degrading, somewhat shocking, and contain elements of disgrace.[121] A communication that is merely unflattering, abusive, annoying, irksome, or embarrassing, or that only hurts the plaintiff's feelings, is not actionable.[122]

### 1. None of these broadcasts is defamatory per se

Whether a statement constitutes defamation per se is initially an inquiry for the court.[123] "Defamation per se refers to statements that are so obviously harmful that general damages … may be presumed."[124] A statement is defamatory per se "if the words in and of themselves are so obviously hurtful to the person aggrieved by them that they require no proof of injury… If the court must resort to innuendo or extrinsic evidence to determine that the statement was defamatory," then the alleged statement constitutes defamation per quod and "requires proof of injury and damages.[125]

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light of the surrounding circumstances… The entire communication—***not mere isolated sentences or portions***—must be considered.")(emphasis added).

[121]*Means v. ABCABCO, Inc.*, 315 S.W.3d 209,214(Tex.App.-Austin 2010,no pet.); Tex.Civ.Prac.&Rem.Code §73.001.

[122]*Means*, 315 S.W.3d at 214

[123]*Hancock*, 400 S.W.3d at 66

[124]*Brady*, 515 S.W.3d at 886

[125]*Main v. Royall*, 348 S.W.3d 381,390 (Tex.App.-Dallas2011, no pet.); *see also Moore v. Waldrop*, 166 S.W.3d 380,386 (Tex.App.-Waco 2005,no pet.); *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682,691 (Tex.App.-Houston [1st Dist.] 2013,pet. denied) ("If the court must resort to innuendo or extrinsic evidence to determine whether a statement is defamatory, then it is defamation *per quod* and requires proof of injury and damages.")

Plaintiffs claim that these broadcasts constitute defamation per se because Jones accused plaintiffs of fraud and a crime.[126] But to constitute defamation per se, Jones' statements or gist must have done so "unambiguously."[127] None of the alleged textual statements unambiguously does so. Indeed, on April 22, Pozner is not even referenced and there is no comment made about DeLaRosa and neither plaintiff is mentioned in the April 28 or June 13 broadcasts.

Defamation can be either textual or extrinsic. Explicit textual defamation occurs when a statement's defamatory meaning arises from the words of the statement itself, without reference to any extrinsic evidence.[128] Within textual defamation, an unambiguous statement can be defamatory, the gist of publication as a whole can be defamatory or the implication – from a "distinct portion" *within that publication* – can be defamatory.[129] Thus plaintiffs' gist and implication claims depend entirely upon what was said by Jones within each of those broadcasts.

***Jones' explicit textual statements were not defamatory***

The following are the "individual" statements from the **April 22** broadcast:

> And then we've got Anderson Cooper, famously, not just with the flowers blowing and a fake, but when he turns, his nose disappears repeatedly because the green-screen isn't set right. And they don't like

[126]CR:1497-1498,¶¶66,67,71
[127]*Hunt v. Airline House, Inc.*, 2017 Tex.App. LEXIS 8519 at *13 (Tex.App.-Houston [14th Dist.] 2017, no pet.)
[128]*Tatum*, 554 S.W.3d at 626
[129]*Tatum*, 554 S.W.3d at 628

> to do live feeds because somebody might run up. CNN did that in the Gulf War and admitted it. They just got caught two weeks ago doing it in supposedly Syria. And all we're saying is, if these are known liars that lied about WMDs, and lied to get us in all these wars, and backed the Arab Spring, and Libya, and Syria, and Egypt, and everywhere else to overthrow governments, and put in radical Islamicists … If they do that and have blood on their hands, and lied about the Iraq War, and were for the sanctions that killed half a million kids, and let the Islamicists … attack Serbia, and lied about Serbia launching the attack, when it all came out later that Serbia didn't do it, how could you believe any of it if you have a memory? If you're not Dory from "Finding Dory," you know, the Disney movie. Thank god you're so stupid, thank god you have no memory. It all goes back to that.[130]

These April 22 statements do not unambiguously charge plaintiffs with fraud or crime.

At the end of the **April 28** press conference Jones held regarding his child custody case,[131] Jones' was asked about Sandy Hook and answered:

> I think we should investigate everything because the government has staged so much stuff, and then they lie and say that I said the whole thing was totally fake when I was playing devil's advocate in a debate. I said maybe the whole thing is real, maybe the whole thing is fake. They were using blue-screens out there…Yes, the governments stage things.[132]

He didn't mention either plaintiff.[133] These statements do not unambiguously charge plaintiffs with fraud or crime.

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[130]CR:1482
[131]CR:1312-1335
[132]CR:1329
[133]CR:1329-1330

Regarding the **June 13** broadcast, plaintiffs failed to produce evidence of the entire broadcast. This is fatal to these claims.

This is because "[w]hether a factual statement is capable of a defamatory meaning depends on a reasonable person's understanding of the whole publication and not merely on individual statements."[134] Because the statements must be viewed in their context, "the entire communication, not mere isolated sentences or portions"[135] must be considered.

"[T]he initial question for determination is a question of law to be decided by the trial court: were the words used reasonably capable of a defamatory meaning."[136] While the statements may be false, abusive, unpleasant, or objectionable to the plaintiff, they may not be defamatory in light of the surrounding circumstances.[137]

Also the determination whether a publication is an actionable statement of fact or a protected expression of opinion also depends upon a reasonable person's perception of the entirety of the publication.[138]

Plaintiffs failed to produce evidence of the entirety of this broadcast.[139] Accordingly, the trial court could not determine that it contained statements that

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[134]*Cullom v. White*, 399 S.W.3d 173, 182 (Tex.App.-San Antonio 2011,pet. denied)
[135]*Vecchio v. Jones*, 2013 Tex.App. LEXIS 8324,*18 (Tex.App.-Houston[1st Dist.] 2013, no pet.)
[136]*Musser*, 723 S.W.2d at 655; *MKC Energy Invs., Inc.*, 182 S.W.3d at 377
[137]*MKC Energy Invs., Inc.*, at 377
[138]*Bentley*, 94 S.W.3d at 579

are capable of a defamatory meaning or if it contained false facts or protected opinion.

In any event, there is no evidence that Jones mentioned either plaintiff in the broadcast.[140]

***The gists of Jones' broadcasts were not defamatory***

Because the text of these statements is not defamatory, plaintiffs must establish that the "gist" of each is false and is defamatory concerning them by clear and specific evidence.

The gist of a publication is its "main point or material point."[141] Because there can be only one "main point," the Texas Supreme Court holds that there can be only one gist.[142]

When viewing each entire broadcast, it is evident that each has only one main theme: reports issued by government and corporate media sources should be questioned. An objectively reasonable reader would not interpret the gist of any of these broadcasts as plaintiffs suggest.

Furthermore, other statements within each of these broadcasts, do not support the meaning alleged by plaintiffs of that broadcast. None of those other

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[139]CR:1349,¶14
[140] CR:1067-1071
[141]*D Magazine Partners, LP v. Rosenthal,* 475 S.W.3d 470 (Tex.App.—Dallas 2015, rev'd on other grounds)
[142]*Tatum*, 554 S.W.3d at 629

statements even concerns either plaintiff. Therefore, no hypothetical reasonable reader would interpret the same meaning as alleged by plaintiffs.

***Jones implied no defamatory meaning***

Because neither the text nor gist of any broadcast supports plaintiffs' claim of being accused of a fraud or crime, plaintiffs impermissibly rely upon innuendo to try to create the following non-existent defamatory meaning:

> Veronique De La Rosa and Leonard Pozner are engaging in a criminal fraud to cover-up of the truth regarding the Sandy Hook massacre and the death of their child.[143]

To support their tortured construction, plaintiffs produced nothing more than affidavits of persons acquainted with them and argue they don't need to show anything further. Plaintiffs are wrong for two reasons.

First, for a court to subject a publisher to liability for defamation by implication, the "plaintiff must make an especially rigorous showing of the publication's defamatory meaning."[144]

Second, to ensure that a defamation-by-implication plaintiff has satisfied the "rigorous" showing of intent, the Texas Supreme Court has instituted additional requirements:

> [A] plaintiff who seeks to recover based on a defamatory implication—whether a gist or discrete implication—must point to "additional, affirmative

[143]CR:859-860
[144]*Tatum*, 554 S.W.3d at 633

> evidence" ***within the publication itself*** that suggests the defendant "intends or endorses the defamatory inference."[145]

The defamatory meaning must arise from the statement's text.[146] Therefore *only text within each broadcast* can be the basis of implied defamation *of that broadcast*.

The Texas Supreme Court explains that the defamation-by-implication inquiry is "objective, not subjective," and those acquainted with the plaintiffs are not the "hypothetical reasonable reader."[147] The reactions of witnesses may not be typical of the meaning an ordinary reader would impute to the statement.[148] Because the defamatory meaning inquiry is objective, affidavits containing assertions from witnesses "regarding their individual subjective perceptions of the validity of…claims are not competent evidence…"[149]

> [T]he question is not whether some actual readers were misled, as they inevitably will be, but whether the hypothetical reasonable reader could be … It may well be true that some actual readers were misled but … a hypothetical reasonable reader would not be.[150]

Plaintiffs' evidence does not supplant the Court's inquiry into whether the alleged defamatory statement can be *implied* to have the meaning attributed by

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[145]*Id.* at 635(emphasis added)
[146]*Id.* at 627
[147]*Id*. at 631
[148]*Musser*,723 S.W.2d at 655
[149]*Rehak Creative Servs. v. Will*, 404 S.W.3d 716, footnote 6 (Tex.App. -Houston [14th Dist.] 2013, pet.denied)
[150]*Houseman v. Publicaciones Paso Del Norte*, 242 S.W.3d 518, 525-526 (Tex. App.—El Paso 2007, no pet.).

plaintiffs. It remains the Court's duty to make such a determination—not the plaintiffs—and in making such determination, this Court's "review must be '***especially rigorous***.'"[151]

Plaintiffs' implication argument also ignores what the hypothetical viewer could consider. That viewer wouldn't ignore all of the statements that negate plaintiffs' claimed construction, including these:

April 22:

> "Quite frankly, I've said I don't know the truth…"[152]
>
> "I believe kids died."[153]
>
> "Don't…lie about me and say that…I think all the parents are liars and nobody died."[154]
>
> "But the bottom line is, the vampires of MSM[155] and corporate media and that whole system are the ones feeding off the dead children of all these mass shootings and these tragedies…"[156]
>
> "And that's why they're the vampires of Sandy Hook, the people that feed off those deaths, and use it to take our Second Amendment and more of our rights…"[157]
>
> "And all I'm saying is look at this, and they want to change the subject and say, 'He says no kids died!' And then edit tapes."[158]

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[151]*Tatum*, at 633
[152]CR:390.
[153]CR:396.
[154]CR:398.
[155]MSM is mainstream media
[156]CR:406.
[157]CR:406.
[158]CR:409.

A reasonable viewer would not ignore these statements in that very broadcast.

June 13:

> "I've said I believe children did die there."
>
> "I believe kids died."
>
> "…the media [is] faking a bunch of *other* stuff…"[159]

No hypothetical reasonable reader could infer from these statements that plaintiffs were even implicated let alone accused of a crime hiding the fact that *children didn't die*.

Realizing that the textual statements and implications did not accuse either plaintiff of fraud or crime, plaintiffs resorted to innuendo and asserted extrinsic broadcasts were necessary to "fully appreciate the defamatory impact."[160]

Since plaintiffs must resort to extrinsic evidence for this court to determine that the broadcasts were defamatory, they cannot be defamatory per se.[161]

**2. None of these broadcasts is defamatory per quod :**

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[159]CR:1069
[160] C.R.1488 ¶36
[161]*Barker,* 2018 Tex.App. LEXIS 4555at *23

***a. Plaintiffs failed to produce clear and specific evidence that the remaining April 22, 28 and June 13 broadcasts were defamatory***

*i. The meaning alleged by plaintiffs is not capable of a defamatory meaning and would not be drawn by an objectively reasonable reader*

In considering whether these statements imply a defamatory meaning, this Court's "task is to determine whether the meaning that plaintiff alleges arises from an objectively reasonable reading."[162] This involves "a single objective inquiry: whether the [publication] can be reasonably understood as stating" the meaning the plaintiff proposes."[163] Because plaintiffs allege that each of these broadcasts was defamatory, they must, for each broadcast, provide evidence of each element.

In this case, plaintiffs admit that neither the April 22, 28 or June 13 statements themselves nor any other statements within each broadcast are defamatory because they reference Jones' other (extrinsic) statements, most of them outside of limitations. The problem for plaintiffs is, as discussed below, innuendo cannot be used to change the meaning of any complained-of-statement and thereby transform a non-defamatory statement into a defamatory one. Nor can

[162]*Tatum*, 554 S.W.3d at 631
[163]*Id.* at 631

plaintiffs use innuendo to *create* an implication because defamation-by-implication cannot rely upon extrinsic evidence.[164]

***Innuendo cannot make Jones' statements defamatory***

Because the text, gist and implications within the broadcasts weren't defamatory, plaintiffs rely on innuendo to transform these non-defamatory statements into defamatory statements. They wrongly argue that innuendo can "enlarge…the natural meaning of words and introduce new matters…"[165]

Plaintiffs' argument is inconsistent with Texas law. An "innuendo may be used to explain, ***but not to extend, the effect and meaning of the language*** charged as" defamatory.[166] "[I]nnuendo" may not transform an unambiguous, non-defamatory statement into a defamatory statement by means of an idiosyncratic interpretation of the statement not readily understandable as affecting the reputation of the plaintiff in the community.[167]

As the Texas Supreme Court has explained:

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[164]*Id.*, at 627

[165]CR:865

[166]*Honeycutt v. Forest Cove Prop. Owners' Ass'n*, 2001 Tex. App. LEXIS 3173, at*8 (Tex.App.-Houston [14th Dist.] 2001,no pet.); *see also Durckel v. St. Joseph Hosp.*, 78 S.W.3d 576, 585 (Tex.App.-Houston [14th Dist.] 2002,no pet.) (citing *ABC, Inc. v. Shanks*, 1 S.W.3d 230 (Tex.App.-Corpus Christi 1999,pet. denied) ("Innuendo… does not permit a plaintiff to ***change the meaning, extend the meaning, or impose a strained construction on the words***.").

[167]*See generally Schauer v. Memorial Care Systems*, 856 S.W.2d 437,448(Tex.App.-Houston [1st Dist.] 1993,no writ); *Newton v. Dallas Morning News*, 376 S.W.2d 396,398-400(Tex.Civ. App.—Dallas 1964, no writ); *Montgomery Ward & Co. v. Peaster*, 178 S.W.2d 302,305(Tex. Civ.App.-Eastland 1944,no writ)

> The innuendo ***explains the words used*** and annexes to them their proper meaning, ***<u>if</u> they are ambiguous***. If the words employed are in no proper sense ambiguous or doubtful and in their ordinary and proper signification convey no defamatory meaning, ***such meaning cannot be enlarged or restricted by innuendo averments***. If the language claimed to be defamatory is not reasonably susceptible of the meaning ascribed to it by innuendo, the innuendo will be unavailing.[168]

Innuendo may only be used by the Court "if [the words used] are ambiguous."[169] Plaintiffs neither pleaded ambiguity in the any of the statements[170] nor argued this in their response.[171]

Without specifying a single ambiguity, plaintiffs' only argument in support of using extrinsic evidence by innuendo is that "the statements in the broadcast can take an additional defamatory meaning from extrinsic circumstances outside the text, through innuendo."[172] Thus plaintiffs admit they impermissibly seek to transform a non-defamatory statement into a defamatory one.

Plaintiffs' argument relies entirely on inadmissible witness testimony. Such testimony has no bearing on whether innuendo is either proper or able to transform the meaning of the statement as alleged by plaintiff because:

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[168]*Gartman v. Hedgpeth*, 157 S.W.2d 139,142 (Tex. 1941) (emphasis added); *see also Newton v. Dallas Morning News*, 376 S.W.2d 396,398-400 (Tex.Civ.App.-Dallas 1964,no writ) ("Where the words can bear but one meaning, and that is obviously not defamatory, no innuendo or other allegation in the pleadings can make them so, and no action lies.")
[169]*Gartman*, 157 S.W.2d at 141 (Tex.1941)
[170]CR:1479-1503
[171]CR:834-895
[172]CR:865,¶26

> The test is what construction would be placed upon such language by the average reasonable person or the general public, not by the plaintiff. It is the duty of the court to determine if the challenged statements are capable of the meaning ascribed to them by the innuendo; if, in the natural meaning of the statements, they are not capable of a defamatory interpretation, the case must be withheld from the jury. In this case, the trial court could properly reject [plaintiff's] attempt to use innuendo to transform permissible speech into actionable defamatory statements.[173]

The test for actionable defamation by innuendo is not how the statement might be construed by the plaintiffs, but how the statement would be construed by the average reasonable person or the general public.[174]

Plaintiffs' arguments regarding innuendo are not intended to explain an ambiguity. Plaintiffs' use of innuendo is intended solely to impermissibly transform a non-defamatory statement into actionable defamation.[175]

Plaintiffs' "tortured construction" of Jones' statements is not what the hypothetical reasonable reader could infer.[176]

*ii. The broadcasts are not reasonably capable of defaming the plaintiffs because they are not "of and concerning" either plaintiff*

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[173]*Honeycutt*, 2001 Tex.App.LEXIS 3173, at *8-9
[174]*Overstreet v. Underwood*, 300 S.W.3d 905,910 (Tex.App-Amarillo 2009, pet.denied)
[175]*Honeycutt* at *9
[176]*See Musser*, 723 S.W.2d at 655

Even if this Court determines that the hypothetical reasonable reader would perceive plaintiffs' construction, the second step "is to answer whether the meaning—if it is reasonably capable of arising from the text—is reasonably capable of defaming the plaintiff."[177] The answer is no.

A defamation plaintiff must establish that "the disputed publications were 'of and concerning'" him.[178] The "settled law ***requires*** ***that the false statement point to the plaintiff and to no one else***."[179]

> There must be evidence showing that the attack was read as ***specifically directed at the plaintiff***… In other words, the publication "must refer to some ascertained or ascertainable person and that person must be the plaintiff."[180]

A "claimed implication" is insufficient to "concern" a defamation plaintiff when it is not consistent with the "plain language" and the "full import" of a defendant's statement."[181] The specific statements and broadcasts that plaintiffs complain of "cannot be 'of and concerning'" them because none of the broadcasts

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[177]*Tatum*, at 625
[178]*Cox Tex. Newspapers, L.P. v. Penick*, 219 S.W.3d 425,433 (Tex.App.-Austin 2007, pet. denied).
[179]*Kaufman v. Islamic Soc'y of Arlington*, 291 S.W.3d 130,145 (Tex.App.-Fort Worth 2009,pet. denied) (emphasis supplied)
[180]*Cox Tex. Newspapers, L.P.*, 219 S.W.3d at 434 (emphasis added)
[181]*Kaufman*, 291 S.W.3d at 145.

or statements "makes even an oblique reference to [either plaintiff] as an individual."[182]

On April 22, Pozner is neither mentioned, shown nor referenced. Plaintiffs' counsel summarized the complete lack of clear-and-specific evidence to satisfy the "of and concerning" element in his argument to the trial court:

> There is no way you can conclude that Ms. De La Rosa is a participant in the cover-up regarding the death of her alleged child and also simultaneously conclude that … Mr. Pozner is not a fraud, because if she's a fake parent, he's not a real parent, because they're in this together … So if Ms. De La Rosa is involved in this malfeasance, if she is part of this scheme and these viewers will take it this way that Sandy Hook is staged … Mr. Pozner cannot be innocent in that.[183]

This 'spousal' claim is not allowed. In *Vodicka v. A. H. Belo Corp*[184], Vodicka and Aubrey sued for defamation. Both claimed that the judge in a case in which they were parties defamed them even though the judge's statements only mentioned Aubrey. When sued, the judge filed a TCPA motion that was granted. On appeal Vodicka argued that *as a spouse*, he was a co-party and had standing to appeal a dismissal of the defamation claim even though he was not mentioned in the statements. The court disagreed, explaining that a defamatory statement must be directed at the plaintiff and that a family member does not have a claim based

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[182] *Cox Tex. Newspapers, L.P.*, 219 S.W.3d at 436 (citing *Sullivan*, 376 U.S. at 289)
[183]RR:112:20-113:6.
[184]2018 Tex. App. LEXIS 5049 (Tex. App.-Dallas, July 5, 2018, no pet. h.)

on defamation of another family member.[185] The court found that Vodicka lacked standing to sue.[186]

Just like *Vodicka*, Pozner claims that even though he was not mentioned, he is entitled to sue for alleged defamation of his wife. But a spouse cannot depend on the defamation claims of the other spouse when the publication didn't name him, didn't concern him and made no reference to him.[187]

The April 22 broadcast's "gist" was not of and concerning either plaintiff. Throughout the entire broadcast, neither plaintiff is named, mentioned or referenced, and the only connection either plaintiff has to the broadcast is the fact that DeLaRosa was briefly shown on the video when Jones criticized CNN for the green screen. The total broadcast lasted over an hour.[188] The main theme of the broadcast has nothing to do with either plaintiff.

Since neither plaintiff is mentioned at all in the April 28 and June 13 broadcasts, they are also not of and concerning plaintiffs.

Further, neither plaintiff has pointed to *any particular statement* that is alleged to be defamatory and "of and concerning" either of them. Plaintiffs instead

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[185]*Vodicka* at *23
[186]*Vodicka* at *25
[187]*Johnson v. Southwestern Newspapers Corp*., 855 S.W.2d 182,188 (Tex.App,-Amarillo 1993,writ denied)
[188]CR:775 and 801

claim that the individual statements are defamatory as a result of their gists.[189] But individual statements cannot be defamatory by gist.[190]

The doctrine of group libel likewise bars plaintiffs' allegations of defamation. "[A]n individual may not, as a general rule, recover damages for defamation of a group or class of persons of which he is a member." [191]

Plaintiffs' own argument establishes that group libel prohibits plaintiffs' claims. Plaintiffs argue that defendants defamed not only both plaintiffs, but anyone and everyone who was connected in any manner. Plaintiffs attached an affidavit of Dr. Wayne Carver who testified that defendants' alleged defamatory statements also defamed even *him*:

> After viewing the video segments, I also drew the conclusion that [defendants] [were] accusing other families and state officials, including myself, of engaging in a fraud or cover-up of the truth regarding the Sandy Hook massacre, since I understood the underlying point

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[189]CR:1497,¶66

[190]*Tatum*, 554 S.W.3d at 629.

[191]*Webb v. Sessions*, 531 S.W.2d 211,213 (Tex.Civ.App.-Eastland 1975, no writ); *see also Wright v. Rosenbaum*, 344 S.W.2d 228,232-233 (Tex.Civ.App.-Houston 1961,no writ) (statement that "one of the four ladies" stole dress, without singling out any one of four, did not establish cause of action for slander); *Eskew v. Plantation Foods, Inc.*, 905 S.W.2d 461,462-464 (Tex.App.-Waco 1995,no writ) (statement that some, but not all, of fired employees were involved in "irregularities" was not actionable by fired employees who had not been singled out or identified as having been involved); *New York Times v. Sullivan*, 376 U.S. 254,289, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964) (statements critizing police operations were insufficient to establish libel against county commissioner who was responsible for oversight of police department); *Cox Tex. Newspapers*, 219 S.W.3d at 433-436 (series of newspaper articles criticizing criminal prosecution could not be defamatory toward district attorney in charge of case because articles were not "of and concerning" district attorney).

> of InfoWars' argument about Sandy Hook was that the event was staged.[192]

As a result of Jones' statement about Anderson Cooper's nose disappearing, Dr. Carver concludes that the true meaning was that *he* was engaged in a massive governmental conspiracy and cover-up of true events. If this statement can be 'of and concerning' Carver, then it is 'of and concerning' any and every person connected with Sandy Hook. Plaintiffs' own witnesses establish that the statement was not "specifically directed at the plaintiff[s]" and thus is not 'of and concerning them'.[193]

### *3. Plaintiffs failed to produce clear and specific evidence that defendants possessed the requisite degree of fault*

The distinction between a private plaintiff and a limited-purpose public figure in a defamation case is important because, while the private plaintiff need only show the media defendant publisher of an allegedly defamatory statement "knew or should have known" that the statement was false, a limited-purpose public figure must show that the broadcaster had "actual knowledge that it was false or the statement was made with reckless disregard of whether it was false.[194]

#### a. *Defendants are media defendants*

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[192]CR:1138-1139,¶17.
[193]*Cox Tex. Newspapers, L.P.*, 219 S.W.3d at 434
[194]*WFAA-TV v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998)

Defendants are categorized as either media or non-media defendants.[195] The term "media defendant" includes members of the "traditional media," (*e.g.*, newspapers, television stations, and radio stations)[196] and members of the electronic, or online, media.[197]

Each defendant falls within both classifications of "media defendant." Defendants' primary business is reporting the news and providing commentary and opinion involving matters of public concern.[198] Plaintiffs' own pleading admits "Jones is the host of radio and web-based news programming."[199] The Alex Jones channel on YouTube has more than two million subscribers and has received 1.3 billion views.[200]

*b. The broadcasts dealt with matters of public concern*

A statement is a matter of public concern if: (1) the statement can be "fairly considered as relating to any matter of political, social, or other concern to the

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[195]*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 333 (1974)
[196]*Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167,170-171(Tex. 2003) (magazine publisher was print media); *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W.3d 609,610-611(Tex.App.-San Antonio 2002,no pet.)(television station was broadcast media); *Greer v. Abraham*, 489 S.W.3d 440, 442-443(Tex.2016)(trial court found blogger qualified as print media).
[197]*SEII, Local 5 v. Professional Janitorial Serv. of Houston*, 415 S.W.3d 387,398(Tex.App.-Houston [1st Dist.] 2013, pet. denied)
[198]CR:1170,¶22
[199]CR:6,¶4.
[200]CR:1170,¶22

community" or (2) the statement concerns "a subject of legitimate news interest that is, a subject of general interest and of value and concern to the public."[201] Whether a statement is a matter of public or private concern is a question of law.[202]

Each statement from the broadcasts in the context in which it was made, as well as the gist of each entire broadcast, conveys the importance of questioning reports issued by the government and mainstream media. These broadcasts can "fairly be considered as relating to any matter of political, social, or other concern to the community." Because they constitute a matter of public concern, the First Amendment provides greater protection to each statement and/or broadcast.[203]

c. *Plaintiffs are limited-purpose public figures*

Each of the plaintiffs became a limited-purpose public figure relating to subject matter of the publications at issue and each must prove actual malice against each defendant.

Public-figure status is a question of law.[204] Determining whether an individual is a limited-purpose public figure is a three-part test: "(1) the

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[201]*Snyder v. Phelps*, 562 U.S. 443, 453 (2011); *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017)
[202]*Conick v. Myers*, 461 U.S. 138, 148 n.7 (1983)
[203]*Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758-759, 105 S. Ct. 2939, 86L.Ed.2d 593 (1985) (plurality opinion) ("[Speech] concerning public affairs is more than self-expression; it is the essence of self-government… Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.")
[204]*WFAA-TV,* 978 S.W.2d at 571

controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy."[205]

To determine whether either plaintiff had more than a trivial or tangential role in the controversy, the Court should consider whether either: (1) actively sought publicity surrounding the controversy; (2) had access to the media; and (3) voluntarily engaged in activities that necessarily involved the likelihood of increased exposure and injury to reputation.[206]

There were at least two national public controversies in which plaintiffs voluntarily participated. As detailed in the statement of facts, DeLaRosa became prominent in public debates over the First and Second Amendments and use of the Sandy Hook tragedy as an impetus for gun-control initiatives and Pozner has embarked on a public "crusade"[207] against "hoaxers" and "conspiracy theorists."[208]

In analyzing the first of *WFAA's* three criteria, it is well-known that many, including high-profile journalists and public officials immediately debated whether

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[205]*WFAA-TV,* 978 S.W.2d at 571-72(Tex.1998)
[206]*Neyland v. Thompson*, 2015 Tex. App. LEXIS 3337, at *19 (Tex. App. - Austin 2015, no pet.)
[207]CR:1612
[208]CR:1619

that tragedy should cause legislative action to restrict certain arms. Such discussions were highly-charged and publicly-aired.

Sandy Hook has been at the epicenter of gun-rights debates for more than five years. Four days after the tragedy, President Obama featured his call for greater gun control during the Sandy Hook prayer vigil.[209] Since that time, 210 new laws have been enacted to strengthen gun safety and additional seven more states have background checks.[210]

Sandy Hook is widely considered a "watershed moment" in the national gun-control debate.[211] As West Virginia Senator Joe Manchin stated, Sandy Hook "changed everything." ABC reported that the debate over gun control was already fierce. That debate has continued unabated and plaintiffs have been active and public participants in that debate.

Within this controversy exists the hundreds of thousands of opinions and discussions on the internet reflecting profound distrust of official government accounts of high-profile tragedies. A June 22, 2018 Google search of the term "Sandy Hook conspiracies" generated 4,160,000 articles. Searching "Sandy Hook shootings gun control" yielded more than 5,950,000 articles.[212]

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[209]CR597-602
[210]CR:610-614
[211]CR:615
[212]CR:1593,¶30

Pozner has taken a publicly active role in this online community. As detailed in the statement of facts, he established a website and with his volunteers, works to cause internet platforms such as Facebook and Google to remove and prevent content from online publishers including defendants.

Both plaintiffs sought and had achieved high-profile roles in these controversies. Both actively sought publicity in order to promote their views; each had access to the media; and each thereby voluntarily engaged in activities that necessarily involved the risk of public criticism.

The controversies concerning mass shootings, the government, conspiracy theories and gun control are quintessentially public issues affecting not only the parties involved in this lawsuit, but the entire nation.

All of the broadcasts related to these controversies. DeLaRosa's sole connection was her image alongside Cooper during Jones' criticism of Cooper, CNN, mainstream media and the government. Showing that video in which Cooper appeared and in which DeLaRosa was briefly shown was certainly germane to Jones' criticisms of him, CNN, mainstream media and government.

Pozner had no connection to these broadcasts at all.

*d. Plaintiffs failed to provide clear and specific evidence of actual malice*

Because plaintiffs are limited-purpose public figures, they must establish that the defendants acted with actual malice.[213]

"Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true."[214] The "constitutional focus is on the defendant's attitude toward the truth, not his attitude toward the plaintiff."[215]

"[R]eckless disregard" … is a high degree of awareness of probable falsity, for proof of which the plaintiff must present 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'"[216]

The "actual malice" standard also differs depending on what a plaintiff alleges is defamatory. When defamation is based on individual statements, actual malice is defined as publishing a statement with knowledge of or reckless disregard for its falsity.[217]

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[213]*Carr v. Brasher*, 776 S.W.2d 567,571(Tex.1989)
[214]*Carr*, 776 S.W.2d at 571
[215]*Greer v. Abraham*, 489 S.W.3d 440,444(Tex.2016)
[216]*Carr*, 776 S.W.2d at 571
[217]*Neely v. Wilson*, 418 S.W.3d 52, 69 (Tex. 2013)

If the claim is based on an entire publication, actual malice is defined as publishing a statement that the defendant knew or strongly suspected could present, as a whole, a false and defamatory impression of events"[218]

> This rule stems from the actual malice standard's purpose of protecting innocent but erroneous speech on public issues, while deterring "calculated falsehood." A publisher's presentation of facts may be misleading, even negligently so, but is not a "calculated falsehood" unless the publisher knows or strongly suspects that it is misleading.[219]

At the time he stated his opinion about the cause of Cooper's nose disappearing, Jones' direct testimony is that he believed that it was caused by a technical anomaly.[220] Plaintiffs didn't produce any evidence contradicting Jones testimony about his state of mind.

Plaintiffs didn't show clear and specific evidence that actual malice was present in any of the alleged defamatory broadcasts. Questioning official reports and citing inconsistencies in statements made by others is not evidence of actual malice.[221]

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[218]*Turner.*, 38 S.W.3d at 120-121(Tex.2000)
[219]*Turner*, 38 S.W.3d at 120
[220]CR:1343-1344
[221]*See, e.g., Bose Corp. v. Cons. Union,* 466 U.S. 485, 512-13 (1984) (choice of language to describe an "event 'that bristled with ambiguities' and descriptive challenges for the [speaker] . . . does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella.").

Further, if plaintiffs are considered private individuals, they nevertheless have failed to provide clear-and-specific-evidence of negligence.

### *4. Plaintiffs failed to produce clear and specific evidence of pecuniary damages*

Plaintiffs asserting a defamation claim "must plead and prove damages, unless the defamatory statements are defamatory per se." [222] If the court must resort to innuendo or extrinsic evidence to determine that the statement was defamatory, then the alleged statement constitutes defamation per quod, not per se, and requires proof of injury and damages.[223] Because plaintiffs' rely upon innuendo and extrinsic evidence, none of the April 22, 28 or June 13 broadcasts can be defamatory per se so they were, at most, defamatory per quod.

But in order to establish damages for defamation per quod and avoid dismissal under the TCPA, plaintiffs were required to establish clear-and-specific-

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[222] *Bedford v. Spassoff*, 520 S.W.3d 901,904(Tex.2017)

[223] *Barker*, 2018 Tex. App. LEXIS 4555 at 23; *Main v. Royall*, 348 S.W.3d 381,390 (Tex.App.-Dallas 2011,no pet.); *see also Moore v. Waldrop*, 166 S.W.3d 380,386 (Tex.App.-Waco 2005,no pet.); *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682,691 (Tex. App.- Houston [1st Dist.] 2013, pet. denied) ("If the court must resort to innuendo or extrinsic evidence to determine whether a statement is defamatory, then it is defamation *per quod* and requires proof of injury and damages.")

evidence of a prima facie case of both the existence and *amount* of damages.[224] Special damages require some form of ***pecuniary loss***.[225]

"General averments of indirect economic losses" do not satisfy the Act's clear and specific evidence standard without "specific facts illustrating how [a defendant's] alleged remarks about [a plaintiff's] activities actually caused such losses."[226]

Plaintiffs did not plead any pecuniary damages and sought damages for mental stress and anguish.[227] The only claim for special damages was general.[228] Likewise, their response to the motion lacks any evidence of the existence or amount of pecuniary damages.[229]

In the Texas Supreme Court case *Bedford v. Spassoff*, the prayer for relief in sought actual and exemplary damages. However neither the petition, the response to the motion to dismiss, nor plaintiff's affidavit attached to the response, identified any actual damages.[230] Noting that "general averments" of economic losses do not satisfy the TCPA's clear-and-specific-evidence standard, the court held there was no evidence of damages.

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[224]*Exxon Mobil Corp. v. Hines*, 252 S.W.3d 496, 501 (Tex.App.-Houston [14th Dist.]2008, pet. denied); *Shipp v. Malouf*, 439 S.W.3d 432, 441 (Tex.App.-Dallas 2014,pet. denied).
[225]*Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142,155 (Tex.2014).
[226]*Bedford,* 520 S.W.3d at 906
[227]CR:1501 ¶94
[228]CR:27,¶83-89
[229] CR:889-891
[230]*Bedford,* 520 S.W.3d at 905

Just as in *Bedford*, the plaintiffs in this case have not offered clear-and-specific-evidence of any monetary loss.

As shown in section V. intra, the trial court erred in considering plaintiffs' late filed declarations over defendants' objections.[231] But even if properly considered, this evidence does not link any specific loss to any specific broadcast, thus it does not satisfy plaintiffs' burden.[232]

Nothing in plaintiffs' timely affidavits avers any monetary amount by which either has been damaged.[233]

Plaintiffs made no attempt to produce any evidence of special damages, much less special damages that were proximately caused by Jones' April 22, 28 or June 13 broadcasts. It was not until after the hearing on defendants' motion that defendants made any attempt to satisfy their burden to produce clear-and-specific-evidence of special damages.

However, during the hearing the trial judge obtained plaintiff's counsel's agreement that no further documents would be filed. [234] The court also stated that the record for it to review would include the filings up until the day of the

[231] Plaintiffs filed supplemental declarations after the hearing (CR:2174-2180). The trial court implicitly overruled defendants' objections to plaintiffs' supplement (CR:2186-2192).
[232]*Bos*, 2018 Tex. LEXIS at *27
[233]CR:889-891
[234]RR:75:16-76:4

hearing.[235]At the conclusion of the hearing, the trial judge stated the record was then closed except he would accept a letter from counsel confirming that what they *had already sent* to be filed was in fact in the court's file.[236]

Thus, plaintiffs' counsel stipulated that the record was closed, no more filings would occur and waived plaintiffs' right to supplement their evidence.

Even the untimely declarations are insufficient to satisfy plaintiffs' burden to produce clear-and-specific evidence of special damages because the declarations are silent as to proximate causation because they don't "link particular facts reflected in the documents to each of the essential elements for which they must present a prima-facie case with respect to each claim".[237]

One of the essential elements of a cause of action for defamation is that the alleged defamatory statement "proximately caused damages."[238] Proximate cause "has two elements: cause-in-fact and foreseeability."[239]

Cause-in-fact means "a defendant's action…was 'a substantial factor in causing the injury and without which the injury would not have occurred."[240] In the present case, the record shows that "tens of thousands" of others engage in the

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[235]RR:98:1-6
[236]RR:159:13-160:1,164:20-166:7
[237]*Cavin*, 545 S.W.3d at 72.
[238]*Bos*, 2018 Tex. LEXIS at *26
[239]*Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex.2009)
[240] *Bos*, 2018 Tex. LEXIS at *27

same "conspiracy theories" as defendants and that plaintiffs were "tormented" and harassed long before Jones' 2017 statements.

Accordingly, plaintiffs were required to provide evidence that their claimed damages arose directly from Jones' 2017 statements and not from his or others' previous actions. In personal injury cases the Texas Supreme Court has held that "if evidence presents other plausible causes of the injury or condition that could be negated, the [proponent of the testimony] myust offer evidence excluding the causes with reasonable certainty."[241] Plaintiffs failed to do so.

The Texas Supreme Court recently decided a similar case where the plaintiff sued for damages from defendant's specific statements but the plaintiff also suffered from numerous defamatory statements by others. Because of others' statements and the plaintiff's failure to link defendant's specific statements to his damages, the court found no evidence of causation.

> [Plaintiff] linked none of his damages to [defendant's] specific statements … Based on [plaintiff's] testimony about what caused his damages and the overwhelming amount of other circumstance impacting [plaintiff's] reputation and mental state, we conclude [defendant's] statements were not a substantial factor in causing [plaintiff's] injuries.[242]

[241] *JLG Trucking, LLC v. Garza*, 466 S.W.3d 157, 162 (Tex. 2015)
[242] *Bos* at *60

Plaintiffs' non-specific, speculative assertions about damages or possible future economic losses are not sufficient to meet the burden of showing a prima facie case for the proximate causation of damages element.[243]

None of Jones' broadcasts was the cause-in-fact of any damages as plaintiffs have admitted that they have already been harassed by hoaxers for years.[244] Just as the plaintiff in *Bos*, long before Jones' 2017 statements, plaintiffs already suffered from an "overwhelming amount of other circumstance impacting [their] reputation and mental state."

And just in *Bos*, plaintiffs have not differentiated the alleged reputational harm and anguish from Jones' alleged defamation from the harm caused by thousands of others' statements, posts and activities. Plaintiffs have also not explained how Jones' 2017 comments caused damages that were not caused by his earlier identical statements that were made outside of limitations. Plaintiffs acknowledge that Jones made the same statements about Cooper's nose

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[243]*Grant v. Pivot Tech. Solutions, Inc.*, 2018 Tex. App. LEXIS 6076, at *34-35 (Tex. App.—Austin Aug. 3, 2018, no pet. h.); *see also Elliott v. S&S Emergency Training Solutions, Inc.*, 2017 Tex. App. LEXIS 4454, *20 (Tex. App.—Dallas May 16, 2017, pet. granted) ("[Plaintiff] did not support its allegations of damages with demonstrable facts, and … not attempt to explain how any damages might have been the natural, probable, and foreseeable result of [defendant's] disclosures. … Therefore, [plaintiff] has not offered clear and specific evidence of causation and damages.").

[244]CR:1351-1353

disappearing in January 2013[245], March 2014[246], July 2015[247], and November 2016[248].

Besides not establishing the cause-in-fact element, plaintiffs have not produced evidence that their claimed pecuniary damages were foreseeable.

Plaintiffs must prove foreseeability of their injuries by "establishing that 'a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission.' Conjecture, guess, and speculation are insufficient to prove cause in fact and foreseeability."[249]

It was not foreseeable that by stating Cooper's nose disappeared as a result of a green screen, or that government and media reports should be questioned, Pozner would suffer damages purchasing online security protection, online monitoring and removal software, or security systems for his home[250] or that DeLaRosa would do the same.[251]

The late filed declarations don't even mention the April 28 or June 13 broadcasts.

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[245] CR:847
[246] CR:847
[247] CR:850
[248] CR:850
[249] *Stanfield v. Neubaum*, 494 S.W.3d 90,97 (Tex. 2016)
[250] CR:2176 ¶¶3,5,6
[251] CR:2178 ¶¶2,3,6

### *5. Plaintiffs failed to produce clear and specific evidence that defendants published a false statement of fact*

Whether a statement is an actionable assertion of fact is a question of law.[252] A statement "is not actionable unless a reasonable fact-finder could conclude that the statement implies an assertion of fact, considering the entire context of the statement."[253] The statement must also be objectively verifiably false.[254]

The Texas Supreme Court has stated:

> [E]ven when a statement is verifiable as false, it does not give rise to liability if the "entire context in which it was made" discloses that it is merely an opinion masquerading as a fact.[255]

In determining whether a statement is opinion or fact, "the Court should: (1) analyze the common usage of the specific language to determine whether it has a precise, well-understood core of meaning that conveys facts, or whether the statement is indefinite and ambiguous; (2) assess the statement's verifiability, that is, whether it is objectively capable of being prove true or false; (3) consider the entire context of the article or column, including cautionary language; and (4)

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[252]*Champion Printing & Copying LLC v. Nichols*, 2017 Tex.App. LEXIS 7909,*52(Tex.App.-Austin 2017,pet. denied)
[253]*Id.*
[254]*Tatum 554 S.W.3d* at 624
[255]*Id.*

evaluate the kind of writing or speech as to its presentation as commentary or 'hard' news."[256]

No complained-of statement on April 22 constitutes a statement of fact. When the broadcast is considered in its entirety, there is no clear-and-specific-evidence that the complained-of statements are not Jones' commentary—that is, his opinions.

Jones displayed a video of Anderson Cooper and provided his opinion of why Cooper's nose disappeared on the video.[257] This is not an assertion of fact. No reasonable listener would interpret Jones's statements regarding the possibility of a blue-screen being used as a statement of fact or asserting factually that DeLaRosa was complicit in a deception. No one suggested that Jones was present during the Cooper/DeLaRosa interview, so his reference could only be construed as an opinion.

This is especially true because Jones, while explaining his opinions, was displaying the very video about which he was providing his commentary.

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[256] *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 341(Tex. App.-San Antonio 1988, writ denied).
[257] *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243,248(1st Cir.2000)(quoting *Haynes v. Alfred A. Knopf. Inc.*, 8 F.3d 1222,1227(7th Cir. 1993) (A false statement is not actionable if "'it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts…'").

Accordingly even if it is verifiably false, the context in which it was made discloses that the statement is his opinion "masquerading as a fact."[258]

**C. Plaintiffs failed to produce clear-and-specific-evidence for each essential element of their claims for conspiracy arising from the remaining April 22, 28 and June 13 broadcasts.**

An action for civil conspiracy requires five elements: (a) a combination of two or more persons; (b) the persons seek to accomplish an object or course of action; (c) the persons reach a meeting of the minds on the object or course of action; (d) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (e) damages occur as a proximate result.[259]

In lieu of any evidence supporting their conspiracy claims, plaintiffs relied solely on the factual predicate for defamation to support their conspiracy causes of action. Plaintiffs didn't provide evidence of any actual acts that might be considered to constitute a conspiracy. In their response, plaintiffs incorrectly argued that they need not provide evidence of the elements of conspiracy to defeat defendants' motion.[260]

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[258]*Tatum*, 554 S.W.3d at 624 *see also Partington v. Bugliosi*, 56 F.3d 1147,1156-1157(9th Cir. 1995)("[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.")
[259]*Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005)
[260]CR:893

In *Craig v. Tejas Promotions, LLC,*[261] the movants complained that the trial court had denied their TCPA motion as to plaintiffs' non-suited conspiracy claim. Movants alleged that the plaintiff made no attempt to establish the elements of this claim and that movants had a separate legal defense to this claim.[262]

The Court held that movants met their initial TCPA burden and sustained that point holding:

> Because appellants met their initial burden as to Promotions's conspiracy claim, we may affirm the district court's order denying the TCPA relief only if Promotions presented a prima facie case as to each element of that theory of liability.[263]

Likewise in *MVS Int'l Corp. v. Int'l Adver. Sols., LLC,* 545 S.W.3d 180 the plaintiffs brought suit to collect a debt. Defendants countersued for conspiracy to ruin their reputation. Plaintiffs filed a TCPA motion that was denied. On appeal, the court held:

> Having found the TCPA applies to most of the conspiracy allegations, [Appellees] carry the burden to clearly and specifically demonstrate a prima facie case.[264]

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[261]*Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287 (Tex. App. – Austin, May 3, 2018, pet. filed)
[262]In the *Craig* case, that defense was preemption by Chapter 134A and in the present case the legal defense is that one cannot conspire with himself.
[263]*Craig*, 550 S.W.3d at 297
[264]*MVS*, 545 S.W.3d at 196

Finding that Appellees failed to make a clear and specific showing that there was a meeting of the minds, the court held that the trial court should have granted the TCPA motion dismissing those claims.[265]

In the present case, plaintiffs failed to show that the purported conspirators had a 'meeting of the *minds*' about the object of their conspiracy.[266] There is only one mind involved: Jones, who cannot conspire with himself. Jones is the sole member of defendants Free Speech Systems and Infowars. [267] Even if plaintiffs established an underlying tort, conspiracy would still be unavailable because a single entity cannot conspire with itself.[268] Because a corporation cannot conspire with itself, corporate agents cannot conspire with each other when they participate in corporate action.[269]

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[265]*Id.*

[266]*Transport Ins. v. Faircloth*, 898 S.W.2d 269,278(Tex.1995)

[267]CR:108,¶3

[268]*Fisher v. Yates*, 953 S.W.2d 370,382(Tex.App.-Texarkana 1997, pet.denied); *see also Editorial Caballero, S.A. de C.V. v. Playboy Enters.*, 359 S.W.3d 318,337(Tex.App.-Corpus Christi 2012,pet. denied) ("[A] company cannot conspire with its own employees as a matter of law.")

[269]*Crouch v. Trinque*, 262 S.W.3d 417,427(Tex.App.-Eastland 2008,no pet.); *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1,5(Tex.App.-Corpus Christi 1991,no writ)(holding that, as a matter of law, a corporation cannot conspire with itself, no matter how many agents of the corporation participate in the alleged conspiracy); *Bayou Terrace Inv. Corp. v. Lyles*, 881 S.W.2d 810,815(Tex.App.-Houston [1st Dist.] 1994,no writ)("[A] corporation cannot conspire with its own management personnel or employees when they act within the scope of their employment or in an agency relationship.")

Plaintiffs also failed to prove a combination of two or more persons[270] and didn't produce clear and specific evidence that the object of any alleged combination was to accomplish an unlawful purpose or a lawful purpose by unlawful means.

Plaintiffs also failed to show they suffered damages as a proximate result of the conspiracy.[271]

**D. Plaintiffs failed to produce clear-and-specific-evidence for each essential element of their claims for respondeat superior arising from the remaining April 22, 28 and June 13 broadcasts.**

The elements of respondeat superior are: (a) the plaintiff was injured as the result of a tort; (b) the tortfeasor was an employee of the defendant; and (c) the tort was committed while the employee was acting within the scope of employment.[272] Plaintiffs failed to offer any evidence, much less clear and specific, to support their claims for respondeat superior.

Plaintiffs' only argument in support of their claim is that:

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

[270] *Firestone Steel Prods. v. Barajas*, 927 S.W.2d 608,614(Tex.1996)
[271] *ERI Consulting Eng'rs. Inc. v. Swinnea*, 318 S.W.3d 867,881 (Tex. 2010)
[272] *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex.2007).

> within the scope of his employment … Here, Plaintiffs' claims ***plausibly arise*** under respondeat superior.[273]

Plaintiffs' argument admits that they failed to bring forth clear-and-specific-evidence that any tort feasor was an employee of any defendant, acting in the course and scope of that employment. They simply assert that their claims "plausibly arise," "if" *they had evidence*.

**E. Plaintiffs did not produce clear-and-specific-evidence regarding their IIED claims arising from November 18, 2016 or 2017 broadcasts of March 8, April 28, June 13, June 18, June 26, and October 26.**

Plaintiffs' First Amended Petition, which was the live pleading at the time of the hearing, asserted IIED claims arising from November 18, March 8, April 22, June 13, June 19, June 26, and October 26 broadcasts. Plaintiffs failed to produce clear-and-specific-evidence to support any of those IIED claims. Plaintiffs failed to produce the videos or accurate transcripts of the November 18, March 8, June 26, and October 26 broadcasts.[274] Plaintiffs were required to produce evidence of the whole broadcasts and could not simply rely on isolated "cherry-picked" statements.

Because the court cannot consider the context of these statements, it cannot determine they were intended to harm the plaintiffs and so extreme and outrageous as to support IIED.

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[273] CR:891-892

[274] CR:775-801 (April 22); 1312-1335 (April 28); 1067-1071 (June 13); 1349, ¶14.

Moreover, IIED is a "gap-filler" tort. Its viability depends on the absence of any other tort remedy. "Even if other remedies do not explicitly preempt the tort, their availability leaves no gap to fill."[275]

This court has held that "[w]here the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available."[276] Where, as here, an IIED claim depends on the same facts as a defamation claim, the IIED claim may not be asserted.[277] Here, because plaintiffs sued for defamation, IIED is not available to them.[278]

Plaintiffs' IIED claims are in any event without merit. The elements of an IIED claim are: the conduct was intentional or reckless; plaintiffs suffered severe emotional distress; the conduct was extreme and outrageous; and it proximately caused the emotional distress.[279]

There is no clear-and-specific-evidence to establish that in any of the publications any defendant acted intentionally or recklessly, that the emotional distress of either plaintiff was severe, that each defendant's conduct in each

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[275]*Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 815 (Tex. 2005)
[276]*Warner Bros. Entm't, Inc. v. Jones*, 538 S.W.3d 781,814-815 (Tex. App.- Austin 2017, pet. filed); *See also Price v. Buschmeyer*, 2018 Tex. App. LEXIS 2314*22 (Tex. App.-Tyler 2018, no pet.)
[277]*Id.*
[278]*Robert B. James, DDS, Inc. v. Elkins*, 553 S.W.3d 596, 610 (Tex.App.-San Antonio May 30, 2018, no pet. h.) (citing *Draker v. Schreiber*, 271 S.W.3d 318, 325 (Tex.App.-San Antonio 2008,no pet.)
[279]*Hoffman-LaRoche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004)

instance was extreme and outrageous, or that each defendant's conduct in each broadcast proximately caused either plaintiff severe emotional distress.[280]

More importantly, each plaintiff must prove that his/her emotional distress was the ***intended or primary*** consequence of each of defendants' conduct with respect to each publication.[281] There is no clear and specific evidence that either plaintiff's emotional distress was the intended or primary consequence of any action of each defendant.

The filing of these new claims before the hearing exposed them to defendants' motion to dismiss *the entire lawsuit*. Plaintiffs neither produced supporting evidence nor argued their IIED clams in their response. The trial court erred in not dismissing each of those claims.

**IV. The trial court erred in finding that defendants failed to establish by a preponderance of the evidence each element of a valid defense**

Even if plaintiffs were able to produce clear-and-specific-evidence of each of their claims for defamation, defamation per se, conspiracy and respondeat superior, this Court must nonetheless dismiss each of their claims because

[280]Whether conduct meets the test of extreme and outrageous is a question of law. *Price v. Buschmeyer*, 2018 Tex.App. LEXIS 2314,*23 (Tex.App.—Tyler 2018, pet.filed)
[281]*GTE Southwest v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999)

defendants established one or more valid defenses to plaintiffs' claims by a preponderance of the evidence.[282]

### A. Statute of Limitations

The limitations period for an action for defamation is one year.[283] Plaintiffs' original petition was filed on April 16, 2018.[284] Defendants' First Amended Answer was filed on June 26, 2018 and asserted the defense of limitations.[285] Plaintiffs first filed a defamation claim relating to the broadcast of June 13, 2017 on July 31, 2018, more than one year later.[286] Thus, plaintiffs' own pleadings provided sufficient evidence of the elements of defendants' defense of limitations as to this claim.

Plaintiffs offered no pleading or affidavit evidencing any basis why the June 13 claim, filed more than one year after the broadcast, was not barred by defendants' limitations defense. The June 13 claim cannot "relate back" to the other claims. Defamation claims cannot be parts of a pattern of wrongful conduct so as to make late filed claims "relate back" nor can they comprise a "continuing tort."[287]

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[282]Tex.Civ.Prac.&Rem.Code §27.005(d)
[283]Tex.Civ.Prac.&Rem.Code §16.002(a)
[284]CR:6
[285]CR:45
[286]CR:1479-1503
[287]*Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 SW3d 563,587-588 (Tex. App.-Austin 2007,pet. denied.)

> Under the relation back doctrine, an original pleading tolls the statute of limitations for claims asserted in subsequent, amended pleadings as long as the amendments are not based on new, distinct or different transactions or occurrences…Texas law treats each alleged defamatory publication as a single transaction with an independent injury.[288]

Thus, even if plaintiffs' had produced clear-and-specific evidence of each element of each claim arising from the June 13 Broadcast, the trial court nonetheless erred in failing to dismiss those causes of action because defendants established by a preponderance of the evidence that those claims are barred by the statute of limitations.

**B. Opinion**

Whether a particular statement is a protected expression of opinion or an actionable statement of fact is a question of law for this Court.[289] "All assertions of opinion are protected by the first amendment of the United States Constitution and article I, section 8 of the Texas Constitution."[290] In determining whether a statement is that of an opinion, "the Court should: (1) analyze the common usage of the specific language to determine whether it has a precise, well understood core of meaning that conveys facts, or whether the statement is indefinite and ambiguous; (2) assess the statement's verifiability, that is, whether it is objectively

[288] *Id.*
[289] *Carr*, 776 S.W.2d at 570
[290] *Id.*

capable of being prove true or false; (3) consider the entire context of the article column, including cautionary language; and (4) evaluate the kind of writing or speech as to its presentation as commentary or 'hard' news."[291]

Jones' statements as described by plaintiffs are merely his opinions. The only evidence before the trial court about whether Jones' statements about CNN's green screen on April 22 or June 13 were his opinions was Jones' own testimony that he simply was opining to his audience.[292]

Jones' statements on April 22 question the government and CNN (and other mainstream media ("if these are known liars"[293]) and are filled with his opinions that the mainstream media and government are not trustworthy and have misled the country to do morally wrong things.

Plaintiffs may disagree with Jones' conclusions and opinions he has expressed based on those conclusions, but that does not lead to defamation claims for ***false*** statements. To the extent that plaintiffs disagree with what they consider to be "facts" in this statement, considering these statements as a whole, it is clear that to a reasonable viewer these statements are merely opinion and personal surmise built upon those facts. Caustic, abusive, unflattering and offensive speech

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[291]*Yiamouyiannis v. Thompson*, 764 S.W.2d 338,341 (Tex.App.-San Antonio 1988,writ denied)
[292]CR:1343-1344,¶2
[293]CR:1268

is not necessarily defamatory nor is speech that hurts the plaintiffs' feelings or is annoying, irksome or embarrassing defamatory.[294]

When one states a fact upon which he or she bases the opinion, or the opinion is based upon facts that are common knowledge, or the facts are readily accessible to the listener, these fall into the category of pure opinion.[295] Here, Jones displayed to his audience the very video about which he opined, letting them also draw their own conclusions.[296] Even if not directed at CNN and the government, as they were, at most these statements were rhetorical hyperbole.[297]

His statement to reporters at the end of his April 28 custody news conference is obviously opinion. His opinion is that he does not trust "government" because they "stage things".

> I think we should investigate everything because ***the government*** has staged so much stuff, and then they lie and say that I said the whole thing was totally fake when I was playing Devil's advocate in a debate. I said maybe the whole thing is real, maybe the whole thing is fake. They were using blue-screens out there… Yes, ***the governments*** stage things.[298]

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[294]*Barker v. Hurst*, 2018 Tex. App. LEXIS 4555,*18 (Tex.App.–Houston [1st Dist.] June 21, 2018

[295]*Lizotte v. Welker*, 45 Conn. Supp. 217,227 (Conn. Super. Ct 1996) cited by *Farias v. Garza*, 426 S.W.3d 808,819 (Tex.App.-San Antonio 2014,pet. denied)

[296]CR:1343-1344,¶2

[297]*Farias v. Garza*, 426 S.W.3d 808,819 ("secret, illegal and corrupt" and "blatant cover-up attempt" were held to be rhetorical hyperbole)

[298]CR:1485,¶23

While others may not share his opinion that governments "stage things," that is not relevant. Judging another's opinions and judging them against the "mainstream" would impermissibly stifle the free thoughts of everyone.[299] Jones's opinion does not become actionable defamation simply because others disagree.

### C. Infowars is not liable

The preponderance of the evidence shows that Infowars, LLC has no relationship to plaintiffs' claims. It does not own or operate the domain name or website located at http://www.infowars.com.[300] It has never employed Alex Jones, Rob Dew or Owen Shroyer.[301] It has never had authority over or control of the content of the broadcasts including any of the allegedly defamatory broadcasts.[302] Infowars does not control defendant Free Speech Systems, nor does Infowars or Free Speech own any interest in the other.[303] Infowars had no control of the content of any broadcast or of the speakers.[304]

## V. The trial court erred in refusing to sustain defendants' timely written objections to plaintiffs' evidence notwithstanding defendants' formal requests to rule on those objections

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[299]"His thoughts inhabit a different plane from those of ordinary men; the simplest interpretation of that is to call him crazy." — Juliet Marillier, *The Dark Mirror*
[300]CR:507,¶46,1347-1348,¶10
[301]CR:*Id*.
[302]CR:507,¶46
[303]CR:1347-1348,¶10
[304]CR:*Id*.

Plaintiffs originally submitted eight affidavits with exhibits. After the hearing, plaintiffs submitted two additional declarations. Defendants objected to all or portions of each affidavit/declaration and to two of the exhibits ("J" and "K"). Defendants' objections to all are summarized and supported with line-by-line objections. The trial court erred by refusing to rule on the objections, despite having been requested to do so twice.[305] Defendants' objections are discussed under each affiant's name, with citations to the record for the affidavits and objections.

### A. Zipp[306]

- First opinion (CR:908-917); objection -- question of law (CR:1406-1407).
- Second opinion (CR:917-921); objection -- irrelevant, not probative of actual malice (CR:1407).
- Both opinions (CR:908-921); objection – opinions unreliable, based on irrelevant acts, improper character evidence, best evidence rule (CR:1407-1408).

[305]CR:2238-2241;2310-2313;RR:90:16-24;91:8-10;163:7-164:19
[306]CR:896-921; objections CR:1406-1430

- "Background Knowledge . . ." (CR:897-898), "Infowars . . . (CR:898-908), "Opinions" (CR:908-921), "Conclusion" (CR:921); objections – conclusory, no personal knowledge, speculative (CR:1408-1431).

**B. Brooke Binkowski**[307]

- No expert foundation – entire opinion (CR:1114-1118); objection CR:1432.[308]
- Not relevant -- (CR:1114-1118); objection CR:1432-1433[309].
- Conclusory – (CR:1114-1118); objection CR:1434-1440.
- No personal knowledge – (CR:1114-1118); objection CR:1434-1440.
- Conclusory, lack of foundation /predicate, lack of personal knowledge -- ¶¶3, 4, 5, 6, 7 (CR:1115), 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, (CR:1116), 18 (CR:1117); objection CR:1434-1440.
- Hearsay – ¶¶4, 5, 6, 7 (CR:1115); 9, 11,12,13,14,15,16,17 (CR:1116), 18 (CR:1117); objection CR:1434-1440.
- Not relevant -- ¶¶3, 5, 6, 7 (CR:1115); 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 (CR:1116), 18 (CR:1117); objection CR:1434-1440.

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[307]CR:1114-1118; objections CR:1432-1440

[308]*Broders v. Heise*, 924 S.W.2d 148, 152-53 (Tex.1996); *City of Keller v. Wilson*, 168 S.W.3d 802, 812-13 (Tex.2005).

[309]*Arant v. Jaffe*, 436 S.W.2d 169, 176 (Tex.Civ.App.-Dallas 1968, no writ); *Upjohn Co. v. Rylander*, 38 S.W.3d 600,611 (Tex.App.–Austin 2000,pet. denied)

- No predicate for expert testimony or expert testimony not probative -- ¶¶7 (CR:1115); 8, 9, 10, 14, 15, 16, 17 (CR:1116), 18 (CR:1117); objection CR:1434-1440.
- Best evidence rule -- ¶¶11, 12, 13, 14, 15, 16, 17 (CR:1116), 18 (CR:1117); objection CR:1434-1440.
- No authentication -- ¶¶11, 12, 13, 14, 15, 16, 17 (CR:1116), 18 (CR:1117); objection CR:1434-1440.

### C. John Clayton[310]

Clayton's opinion is inadmissible for these reasons:

Clayton last worked for Jones more than nine years ago.[311] Whatever facts he relies on are too remote to be probative of Jones' mental state on the dates of these broadcasts.

Clayton doesn't state he is familiar with the publications at issue in this case. His opinion is therefore not reliable because opinion testimony must be tied to the facts of the case.[312]

The accusations that Jones "no longer had any commitment to the principles and philosophy of the independent media movement," "it became apparent that he made a conscious decision not to care about accuracy" and "it become [sic]

[310]CR:1149-1151
[311]CR:1150,¶3-5
[312]*Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623,629 (Tex.2002)

standard practice in InfoWars to disregard basic protocols in journalism"[313] violate Tex. Evid. Rules R. 404(a)(1) prohibiting evidence of a character trait to prove that in a particular instance the actor acted in accordance with that trait.[314]

For evidence of routine or habit to be admissible under Rule 406, it must establish a regular response to a repeated specific situation.[315] Although Clayton alludes to many occasions, he cites no examples. This Court must take his word that they exist and that the undescribed incidents are sufficiently similar.[316]

### D. Leonard Pozner[317]

- Conclusory, not relevant, no nature, extent or degree as required -- damages statement at ¶17.[318]
- No personal knowledge shown -- All paragraphs (CR:1129-1131); objection CR:1443-1448.
- Not relevant – statements at ¶7, 8 (CR:1129), 9-14 (CR:1130), 15-17 (CR:1131); objection CR:1443-1448.
- Conclusory -- statements at ¶¶7, 8 (CR:1129); 9, 10, 12, 13, 14 (CR:1130), 15, 16, 17 (CR:1131); objection CR:1443-1448.

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[313]CR:1150,¶8-9
[314]CR:1442
[315]*Ortiz v. Glusman*, 334 S.W.3d 812,816 (Tex.App.–El Paso 2011,pet. denied)
[316]CR:1442
[317]CR:1129-1131
[318]CR:1131; objection CR:1443

- Lack of predicate, no personal knowledge -- statements at ¶¶7, 8 (CR:1129); 9, 10, 12, 13, 14 (CR:1130), 15, 16, 17 (CR:1131); objection CR:1443-1448.
- Hearsay – statement at ¶13 (CR:1130); objection CR:1445-1446.

### E. Enrique Armijo[319]

Plaintiffs withdrew this from evidence because it contains opinions on questions of law.[320]

### F. Grant Fredericks[321]

| | |
|---|---|
| Statements--p. 8, l. 1-8 (CR:1127) | Objections--Not relevant, conclusory, lack of foundation/predicate, lack of personal knowledge. CR:1454 |
| Statements--p. 8, l. 10 - 11 (CR:1127) | Objections--Not relevant, conclusory, lack of foundation/predicate, lack of personal knowledge. CR:1454-1455 |

### G. Veronique DeLaRosa[322]

- Conclusory -- Statements at ¶¶3, 4, 6 (CR:1133), 9-19 (CR:1134), 20-28 (CR:1135), objection CR:1455-1467.
- Hearsay – Statements at ¶¶9, 10, 15-17, 19 (CR: 1134), 20-24, 27, 28 (CR:1135); objection CR:1456-1467.

[319]CR:1144-1148
[320]RR:94:5-95:8
[321]CR:1120-1127; objections CR:1450-1455
[322]CR:1133-1136; objections CR:1455-1468

- Lack of personal knowledge, no foundation or predicate – Statements at ¶¶3, 4 (CR:1133), 10, 11, 12, 13, 15, 16, 17 (CR: 1134), 20-22, 26-29 (CR: 1135); objection CR:1455-1468.
- No authentication – Statements at ¶¶10, 15-17, 19 (CR:1134), 20-24 (CR: 1135); objection CR: 1456-1465.
- Best evidence rule – Statements at ¶¶10, 15-17, 19 (CR:1134), 20-24 (CR:1135).
- Not relevant – Statements at ¶¶14 (CR:1134), 25, 29 (CR:1135); objection CR:1457, 1465-1468.

**H. Wayne Carver, II, M.D.**[323]

Statements in paragraphs 9, 11, 12, 13, 14, 15, 16 and 17[324] – objections: conclusory, lack authentication, hearsay, best evidence rule, lack foundation/predicate and lack of personal knowledge. [325]

Statements in paragraphs 12, 13, 14, 15 and 16 – objections: not relevant or probative on questions of law on defamatory meaning,[326] innuendo,[327] and whether defamatory per se.[328]

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[323]CR:1138-1139; objections CR:1468-1473
[324] CR:1470-1473
[325] CR:1468-1473
[326]*Musser*, 723 S.W.2d at 654
[327]*Arant*, 436 S.W.2d at 176
[328]*Hancock v. Veriyam*, 400 S.W.3d 59,66 (Tex.2013)

**I. Andrea Distephan**[329]

No authentication -- Statements at ¶¶3-4 (CR:1141); objection CR:1473.

Not relevant -- Statements at ¶¶2, 5-10;[330] objection CR:1474-1475[331]

**J. Exhibit J**

Exhibit J[332] -- not relevant, no authentication, hearsay, violates Rule 403; objection CR:1475.

**K. Exhibit K**

Exhibit K[333] -- not relevant, no authentication, hearsay, violates TRE 403; objection CR:1475.

Defendants object to plaintiffs' declarations (L. and M. below) because they were submitted after the hearing was completed and the record was closed.

**L. Objections to Pozner's late filed declaration**

- Hearsay – statement at ¶2 sentence 1-2, ¶3 sentence 3,4, ¶4 (numbered 5) last sentence, ¶5 (numbered 6) sentence 1-2, ¶5 (numbered 6) last sentence (CR:2176); objection CR:2188-2189.

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[329]CR:1141-1142
[330]CR:1141-1142
[331]Question of law - *Bingham v. Southwestern Bell Yellow Pages, Inc*., 2008 Tex. App. LEXIS 463, *9-10 (Tex.App.–Ft. Worth 2008,no pet.) (citing *Musser,* 723 S.W.2d at 655; reasonable person standard - *Arant*, 436 S.W.2d at 176
[332]CR:1093-1098
[333]CR:1099-1113

- Not relevant -- statement at ¶2, sentence 1-2, ¶6(numbered 7) all sentences (CR:2176); objection CR:2188-89.
- Conclusory -- statement at ¶2, sentence 1-3, ¶3 sentence 3, ¶5 (numbered 6) sentence 2 (CR:2176); objection CR:2189.
- Lack of foundation/predicate for opinion -- statement at ¶2, sentence 1-3, ¶3 sentence 3, ¶4 (but numbered 5) sentence 1-2 (CR:2176); objection CR:2188-89.
- Best evidence -- statement at ¶2, sentence 1-2 (CR:2176); objection CR:2188.
- Speculation -- statement at ¶3, sentence 3 (CR:2176); objection CR:2189.

**M. Objections to DeLaRosa's late filed declaration**

- Hearsay – Statement at ¶2 sentence 1-2, ¶3 sentence 1-4, ¶6 sentence 1 and last (CR:2178); objection CR:2190.
- Not relevant -- Statement at ¶2 sentence 1-2, ¶7 all sentences (CR:2178); objection CR:2190-2191.
- Conclusory -- Statement at ¶2 sentence 1-3, ¶6 sentence 1, ¶7 all sentences (CR:2178); objection CR:2190-2191.

- Lack of opinion foundation/predicate -- Statement at ¶2 sentence 1-3, (proof of amount paid for medical services is not proof of reasonableness. Expert testimony required to show medical services were reasonable and necessary);[334] ¶7 all sentences (CR:2178); objection CR:2190-2191.
- Best evidence -- Statement at ¶2 sentence 1-2, ¶6 last sentence (CR:2178); objection CR:2190.
- Speculation -- Statement at ¶3 sentence 4, ¶7 all sentences (CR:2178); objection CR:2191.
- No showing of personal knowledge -- Statement at ¶3 sentence 4, ¶6 sentence 1-3 (CR:2178); objection CR:2190.

## RELIEF REQUESTED

Appellants request this Court to reverse the trial court's order, dismiss all claims against defendants and remand the case to the trial court to render judgment on defendants' claim for attorney's fees and costs.

[334] *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 492 (Tex.App.-Amarillo 2006, no pet.)

Respectfully submitted,

*/s/ Mark C. Enoch*

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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 Appellants' Brief contains 14,882 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 2010 in 14 point (12 point for footnotes) Times New Roman type style.

I declare under penalty of perjury that the foregoing is true and correct.

*/s/ Mark C. Enoch*
Mark C. Enoch

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellants' Brief has been served upon the parties listed below via efile.txcourts.gov's e-service system on November 14, 2018:

Mark Bankston
Kyle Farrar
Kaster, Lynch, Farrar & Ball, LLP.
1010 Lamar, Suite 1600
Houston, Texas 77002

*/s/ Mark C. Enoch*
Mark C. Enoch

*ORAL ARGUMENT REQUESTED*

NO. 03-18-00603-CV

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

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ALEX E. JONES, INFOWARS, LLC AND FREE SPEECH SYSTEMS, LLC

*APPELLANTS*

v.

LEONARD POZNER AND VERONIQUE DE LA ROSA

*APPELLEES*

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ON APPEAL FROM CAUSE NUMBER D-1-GN-18-001842
345TH DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. SCOTT JENKINS PRESIDING

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**APPENDIX TO APPELLANTS' INITIAL BRIEF**

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# Tab A

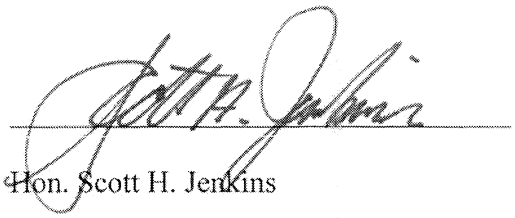
CAUSE NO. D-1-GN-18-001842

| | | |
|---|---|---|
| LEONARD POZNER AND VERONIQUE DE LA ROSA | § | IN THE DISTRICT COURT OF |
| | § | |
| *Plaintiffs* | § | |
| | § | |
| vs. | § | TRAVIS COUNTY, TEXAS |
| | § | |
| ALEX E. JONES, INFOWARS, LLC, AND FREE SPEECH SYSTEMS, LLC | § | |
| *Defendants* | § | 345th JUDICIAL DISTRICT |

**ORDER DENYING MOTION TO DISMISS**

On August 1, 2018, the Court heard *Defendants' Motion to Dismiss under the Texas Citizens' Participation Act*. After considering the arguments of counsel and the record, including plaintiffs' declarations filed on August 2, the Court ORDERS that defendants' motion is in all respects DENIED.

Signed August 29, 2018.



Hon. Scott H. Jenkins

# Tab B

# CIVIL PRACTICE AND REMEDIES CODE

## TITLE 2. TRIAL, JUDGMENT, AND APPEAL

## SUBTITLE B. TRIAL MATTERS

## CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or

(vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following,

even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.002. PURPOSE. The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:
Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 1, eff. June 14, 2013.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

(1) the right of free speech;

(2) the right to petition; or

(3) the right of association.

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and

specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:
Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 2, eff. June 14, 2013.

Sec. 27.006. EVIDENCE. (a) In determining whether a legal action should be dismissed under this chapter, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.007. ADDITIONAL FINDINGS. (a) At the request of a party making a motion under Section 27.003, the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section

27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

(c) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1042, Sec. 5, eff. June 14, 2013.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.
Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 5, eff. June 14, 2013.

Sec. 27.009. DAMAGES AND COSTS. (a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of

the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 3, eff. June 14, 2013.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

# Tab C

| | | ***Pozner's Legal Actions **** | | | |
|---|---|---|---|---|---|
| Legal Actions | Against | April 22 | April 28 | June 13 | June 18 |
| | | | | | |
| Defamation *per quod* | Jones | X | X | X | X |
| Defamation *per se* | | X | X | X | X |
| Conspiracy | | X | X | X | X |
| Respondeat Superior | | X | X | X | X |
| Defamation *per quod* | Infowars | X | X | X | X |
| Defamation *per se* | | X | X | X | X |
| Conspiracy | | X | X | X | X |
| Respondeat Superior | | X | X | X | X |
| Defamation *per quod* | Free Speech Systems | X | X | X | X |
| Defamation *per se* | | X | X | X | X |
| Conspiracy | | X | X | X | X |
| | | ***De La Rosa's Legal Actions **** | | | |
| Defamation *per quod* | Jones | X | X | X | X |
| Defamation *per se* | | X | X | X | X |
| Conspiracy | | X | X | X | X |
| Respondeat Superior | | X | X | X | X |
| Defamation *per quod* | Infowars | X | X | X | X |
| Defamation *per se* | | X | X | X | X |
| Conspiracy | | X | X | X | X |
| Respondeat Superior | | X | X | X | X |
| Defamation *per quod* | Free Speech Systems | X | X | X | X |
| Defamation *per se* | | X | X | X | X |
| Conspiracy | | X | X | X | X |

*These are in addition to Plaintiffs' IIED claims