Combatting Cyber/Media Abuse through The Civil Justice System: The Sandy Hook Story

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2019 NCVBA National Conference

December 4-6, 2019

Denver, CO

**INTRODUCTION**

Our media’s fascination with crime is as old as media itself, but the past twenty years has seen a steady rise in exploitative sensationalist coverage combined with a troubling disregard for accuracy. Too many crime victims are being harassed and retraumatized by media outlets creating a reckless circus around their grief. In the most extreme cases, victims are maliciously targeted by fake news con-artists who knowingly push false stories to attract attention. Nowhere is this better illustrated than Alex Jones and his five-year obsession with the Sandy Hook Elementary School shooting.

This paper will provide an analysis of the defamation and intentional infliction of emotional distress lawsuits filed against Mr. Jones by Kaster Lynch Farrar & Ball, LLP on behalf of four Sandy Hook parents. Each of these four lawsuits has survived an anti-SLAPP motion in the trial court, and two have already been affirmed on appeal at the time of this paper. The paper will breakdown the legal mechanics that come in to play when filing defamation and IIED lawsuits in the current era of “anti-SLAPP” statutes. The paper will also address the Constitutional defense challenges faced when bringing a defamation or IIED claim.

**I. FACTUAL BACKGROUND OF THE TEXAS SANDY HOOK LAWSUITS**

 **A. Neil Heslin**

It was only a couple of hours after Neil Heslin dropped off his son at Sandy Hook Elementary when he got an automated call telling him the school was on lockdown. A short time later, another call instructed parents to return to the school. Mr. Heslin was not overly alarmed. There was no indication a mass shooting had occurred, and nobody would ever have imagined in December 2012 that someone would brutally attack a group of first-graders.

When he arrived to pick up his son, the scene was crowded with confused parents and conflicting information, but Mr. Heslin eventually learned that his son lay inside one of the twenty small body-bags in a makeshift mortuary erected in the parking lot of the school. In the course of learning about the dreadful events of that morning, Mr. Heslin was told of his son’s last actions. While the story relayed by law enforcement was surreal and heart-wrenching, for Mr. Heslin it was not surprising, knowing his son as he did. As disturbed gunman Adam Lanza entered the classroom and murdered his teacher, Mr. Heslin’s son leapt from under his desk and sprinted at Lanza, yelling at his classmates to run. During the commotion caused by this courageous six-year-old, nine children escaped from the classroom unharmed.

In all the painful memories of those events, Mr. Heslin found refuge in the last moments he spent with his son. Mr. Heslin was able to hold his son’s body in his arms, run his fingers through his shaggy mop of hair, and give him a final kiss on the cheek before laying his little hero to rest.

InfoWars, in its malicious campaign of incomprehensible lies about Sandy Hook, sullied and tarnished that pure memory, cast Mr. Heslin as a liar, and ultimately placed him and his family in danger. As far back as 2013, Mr. Heslin had been distressed over InfoWars and its maniacal fabrications about Sandy Hook, but he was determined not to dignify the allegations by acknowledging their existence. Five years ago, InfoWars was still a fringe operation with little recognition outside conspiracy circles. But over the years, as InfoWars continued its sensationalist lies, its audience and influence steadily grew.

As Jones’ inflammatory statements reached a wider audience, it was accompanied by a growing tide of public indignation. In June 2017, Megyn Kelly produced a feature story on the fallout from InfoWars’ various accusations. Ms. Kelly convinced Mr. Heslin to appear for an interview to discuss the pain caused by InfoWars’ lies about Sandy Hook. Mr. Heslin briefly appeared in Ms. Kelly’s segment, and he stated that “I lost my son. I buried my son. I held my son with a bullet hole through his head.”

One week later, InfoWars retaliated with a cruel and false accusation against Mr. Heslin, delivered by InfoWars host Owen Shroyer. The premise of Mr. Shroyer’s video was that Mr. Heslin was lying about having held his son’s body and having seen his injury. With an air of arrogant mockery, Mr. Shroyer claimed that Mr. Heslin’s statements were “not possible.” Mr. Shroyer then used dishonestly manipulated video footage to give the false impression that Sandy Hook parents weren’t allowed to see their children’s bodies. He then mocked Mr. Heslin as a liar, stating “you would remember if you held your dead kid in your hands with a bullet hole. That’s not something that you would just misspeak on.”

The segment was a calculated and unconscionably cruel hit-job intended to smear and injure a parent who had the courage to speak up about InfoWars’ falsehoods. When Mr. Heslin learned about the video, he asked Kaster Lynch Farrar & Ball, LLP to bring a lawsuit on his behalf in June of 2018. Earlier this year, the Texas Court of Appeals dismissed Mr. Jones’ interlocutory appeal regarding its anti-SLAPP motion. *Jones v. Heslin*, 03-18-00650-CV, 2019 WL 4125122, at \*2 (Tex. App.—Austin Aug. 30, 2019, no pet. h.).

 **B. Leonard Pozner and Veronique De La Rosa**

Leonard Pozner and Veronique De La Rosa lost their son in the Sandy Hook shooting. Between 2013 and 2016, they endured waves of harassment as InfoWars host Alex Jones took to the air on over thirty occasions and published scores of articles claiming that the Sandy Hook shooting was staged and that the Plaintiffs and other parents were actors in a ghastly plot to fabricate a national tragedy.

But in 2016, an InfoWars follower named Lucy Richards began stalking the Pozner family. Ms. Richards had become convinced that the Pozner family were actors and frauds. Though the Pozner family had suffered threats and harassment for several years since the death of their son, their experience with Lucy Richards brought a new level of terror. Ms. Richards lived in the same county in Florida where the Pozner family relocated, and she managed to discover their closely guarded contact information. Mr. Richards began calling the Pozners and leaving horrifying threats on voicemail, such as “death is coming to you real soon and there’s nothing you can do about it.” She also began sending an escalating series of death threats via electronic messages.

Fortunately, in December of 2016, law enforcement was able to locate and apprehend Lucy Richards, who later plead guilty to threatening the family. During her prosecution, it became so clear that Mr. Jones’ lies about the Plaintiffs had motivated her conduct that after the end of her sentence in federal prison, Ms. Richards will be prohibited from viewing InfoWars programing. Nor was this the Pozner’s only cause for alarm. During that same month, an InfoWars fan named Edgar Welch opened fire inside a Washington, D.C. pizzeria in an attempt to investigate “PizzaGate,” an allegation featured on InfoWars that Democratic Party elites operated a child sex dungeon in the pizzeria. The Pozner family was terrified of what might come next.

Mr. Jones ultimately apologized to the pizzeria and stopped talking about PizzaGate. Yet despite Lucy Richards’ widely publicized arrest, he made no similar apology to the Pozner family. Even worse, Mr. Jones refused to stop his outrageously false statements about Sandy Hook. A few months later, on April 22, 2017, he revived his sick campaign of lies, telling his viewers that Sandy Hook was staged and that Veronique De La Rosa’s interview with Anderson Cooper in Newtown in the days following the shooting had been faked using a bluescreen. Not only did Mr. Jones claim Mrs. De La Rosa’s interview was fake, but during the broadcast he also alleged that the Pozners’ son and the other victims could not have attended Sandy Hook Elementary because the school had actually been closed, and that it was only reopened to stage a tragedy.

 When the Pozners learned of this video, they knew they had to act. The Pozner family could not let Mr. Jones’ malicious lies put their lives at further risk, and they asked Kaster Lynch Farrar & Ball, LLP to bring a lawsuit for defamation. Last fall, the trial court denied Mr. Jones’ anti-SLAPP motion. The case is currently on appeal.

**II. THE ANTI-SLAPP PROCESS**

 Over the past decade, an increasing number of state legislatures have passed “anti-SLAPP” statutes, seeking to provide quick resolution of “strategic lawsuits against public participation.” These laws provide for an expedited motion to dismiss in which a plaintiff must produce *prima facie* evidence in support of the claim under an abbreviated timeline, frequently with limited or no discovery. Thirty states now have an anti-SLAPP statute, and two states have case law applying an anti-SLAPP process. Those states are shown in green and orange below:



 These statutes pose an onerous burden on plaintiffs. In addition to the stringent requirements of the motion itself, nearly every anti-SLAPP statute requires an award of mandatory attorney’s fees if the motion is granted. These statutes can seem like formidable deterrents from pursuing these claims, but careful attention to the elements of the cause of action will ensure that valid claims survive. This paper focuses on case law interpreting the Texas Citizens’ Participation Act (Tex. Civ. Prac. & Rem. Code Sec. 27.001), which is quite typical of anti-SLAPP statutes.

**II. PROVING DEFAMATION IN THE SANDY HOOK CASES**

To survive a motion to dismiss, a defamation plaintiff must show *prima facie* evidence of the following:

(1) a publication of a false statement of fact to a third party that was defamatory concerning the plaintiff,

(2) with the requisite degree of fault, and

(3) damages.

*Exxon Mobil Corp. v. Rincones,* 520 S.W.3d 572, 579 (Tex. 2017). *Prima facie* refers to the “minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.” *In re Lipsky,* 460 S.W.3d 579, 590 (Tex. 2015). “Though the TCPA initially demands more information about the underlying claim, the Act does not impose an elevated evidentiary standard or categorically reject circumstantial evidence.” *Id.* at 591. As such, the Supreme Court “disapprove[d] those cases that interpret the TCPA to require direct evidence of each essential element of the underlying claim to avoid dismissal.” *Id.* Instead, “pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff should be sufficient to resist a TCPA motion to dismiss.” *Id.*

 **A. The Statements Must be Assertions of Fact.**

A statement is considered a fact if it is verifiable, and, if in context, it was intended as an assertion a fact. “A statement that fails either test—verifiability or context—is called an opinion.” *Dallas Morning News, Inc. v. Tatum,* 16-0098, 2018 WL 2182625, at \*16 (Tex. May 11, 2018). In the Sandy Hook cases, the assertion about Mrs. De La Rosa’s interview passes the first test because it was verifiable. Mr. Jones stated that the interview was fake and that “the green-screen isn’t set right.” If there is no green-screen, his assertion is verifiably false. Likewise, InfoWars claimed that Mr. Heslin never held his son’s body. If Mr. Heslin did hold his son’s body, the statement can be shown to be false.

Notably, courts can examine a statement in the “entire context in which it was made.” *Id.* \*10. Thus, Mrs. De La Rosa could offer four years of Mr. Jones’ videos on this issue during which he has always assured his viewers that he is making a statement of fact about her interview:

* “It's clearly blue screen. I've worked with blue screen for 17 years. We've got it right in there. We know what it looks like. We know what the anomalies look like, and we know what happens when you don't tune it properly. It's clearly blue screen.”
* “I've been working with blue screen, again, for 17 years. I know what it looks like. It's clearly blue screen, clearly.”
* “You got green screen with Anderson Cooper where I was watching the video and the flowers and plants are blowing in some of them, and then they blow again the same way.”
* “It's looped, and then his nose disappears. I mean, it's fake.”
* “I've been in TV for 20-something years. I know a blue screen or a green screen.”
* “We point out clear chroma key, also known as blue screen or green screen being used.”

It is important to note that a media defendant like Mr. Jones cannot shield himself by using hedge language such as “I think that…” or “It is my opinion that…” in order to signal an opinion. “As Judge Friendly aptly stated: ‘[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’” *Bentley v. Bunton,* 94 S.W.3d 561, 583–84 (Tex. 2002). After all, “an opinion, like any other statement, can be actionable in defamation if it expressly or impliedly asserts facts that can be objectively verified.” *Campbell v. Clark,* 471 S.W.3d 615, 625 (Tex. App.—Dallas 2015, no pet.).

 **B. The Statements Must Implicate the Plaintiff.**

When bringing a defamation claim, it is essential that the statements made by the defendant implicate the plaintiff. This is known as the “of or concerning” requirement. “A publication is ‘of and concerning’ the plaintiff if persons who knew and were acquainted with the plaintiff understood from viewing the publication that the allegedly defamatory matter referred to the plaintiff.” *Allied Mktg. Group, Inc. v. Paramount Pictures Corp.,* 111 S.W.3d 168, 173 (Tex. App.—Eastland 2003, pet. denied). The plaintiff need not be mentioned by name. “It is not necessary for the individual referred to be named if those who knew and were acquainted with her understood from reading that it referred to her.” *Backes v. Misko*, 486 S.W.3d 7, 24-25 (Tex. App.—Dallas 2015, pet. denied).

This is an easy burden to meet, even for unnamed plaintiffs. It is enough that the evidence supports a “reasonable inference that some people” who saw the statements believed they concerned the plaintiff. *Tatum*, 2015 Tex. App. LEXIS 13067, at \*16 (*rev’d on other grounds*). “Even if the plaintiff is not expressly named, the plaintiff may satisfy his burden on the ‘of and concerning’ element by offering proof that persons acquainted with the plaintiff would understand the publication to refer to him.” *Cox Texas Newspapers, L.P. v. Penick,* 219 S.W.3d 425, 433 (Tex. App.—Austin 2007, pet. denied). Thus, affidavits showing that individuals understood the defamatory remarks to concern the plaintiff are sufficient to carry the burden under an anti-SLAPP motion.

 **C. The Statements Must be Susceptible of a Defamatory Meaning.**

In each of the Sandy Hook cases, InfoWars argued the statements could not be interpreted as defamatory. The determination to be made in an anti-SLAPP proceeding is whether “the statements were reasonably susceptible of a defamatory meaning.” *Musser v. Smith Protective Services, Inc.,* 723 S.W.2d 653, 654 (Tex. 1987). Any false statement can be defamatory if it contains “the element of disgrace or wrongdoing.” *Means v. ABCABCO, Inc.,* 315 S.W.3d 209, 215 (Tex. App.—Austin 2010, no pet.). Regarding Mrs. De La Rosa’s interview, InfoWars argued there was nothing defamatory about being accused of faking an interview.

Mrs. De La Rosa offered expert opinion from Fred Zipp, the former editor of the Austin Statesman and current University of Texas journalism professor. Analyzing the video and its general context, Mr. Zipp concluded the gist of the video is that Ms. De La Rosa’s fake interview is evidence of an evil conspiracy underlying Sandy Hook. Given the circumstances, a person of ordinary intelligence could reasonably draw the implication that InfoWars was alleging Mrs. De La Rosa’s interview is evidence that Sandy Hook was staged and that the alleged parents are participating in a cover-up. An ordinary viewer could also reasonably draw the implication that InfoWars was alleging that Ms. De La Rosa is not a parent, but rather an actor participating in CNN’s insidious scheme.

A defamatory meaning can be shown through innuendo, and it is merely required that the interpretation offered by a plaintiff “be reasonably susceptible of the meaning ascribed to it by the innuendo.” 50 Tex. Jur. 3d Libel and Slander § 101. Yet as Plaintiffs’ expert noted, nobody who has been paying attention to Mr. Jones has any ambiguity about the meaning of his claims. His statements about Mrs. De La Rosa’s interview were part of his years-long campaign to convince his viewers that the events of Sandy Hook should not be believed.

 **D. A Crime Victim Should not be Considered a Public Figure.**

 In most media cases involving crime victims, the media defendant will argue the plaintiff is a limited purpose public figure who must show actual malice. Limited purpose public figures “are only public figures for a limited range of issues surrounding a particular public controversy.” *WFAA-TV, Inc. v. McLemore,* 978 S.W.2d 568, 571 (Tex. 1998). Some defendants will argue that media interest around a crime renders all victims fair game for negligent defamation. For instance, InfoWars claimed the Sandy Hook parents were public figures concerning the controversy over whether Sandy Hook was staged.

These arguments were rejected. To the extent Plaintiffs have any notoriety in the controversy over whether Sandy Hook is a hoax, it is only because Mr. Jones inflicted that notoriety by repeatedly discussing them. “A person does not become a public figure merely because he is ‘discussed’ repeatedly by a media defendant or because his actions become a matter of controversy as a result of the media defendant's actions.”*Klentzman v. Brady*, 312 S.W.3d 886, 905 (Tex. App.—Houston [1st Dist.] 2009, no pet.), *quoting* *Hutchinson v. Proxmire,* 443 U.S. 111, 135 (1979) (noting that “[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”) Under well settled law, “the allegedly defamatory statement cannot be what brought the plaintiff into the public sphere.” *Neely v. Wilson*, 418 S.W.3d 52, 71 (Tex. 2013).

For this reason, plaintiffs are allowed to respond to a defendant’s defamatory accusations without becoming a public figure. Some of the Sandy Hook parents, such as Mr. Heslin and Mr. Pozner, spoke out publicly about Mr. Jones’ lies. Yet these defensive statements did not transform them into public figures. Where a plaintiff publicly responds to a prior defamation, courts decline to find that defensive statements constitute a purposeful injection making plaintiff a public figure. *See, e.g, Hutchinson,* 443 U.S. at 135 (Plaintiff must be “a public figure prior to the controversy engendered by the [defendant’s conduct].”); *Lohrenz v. Donnelly*, 350 F.3d 1272, 1281-82 (D.C. Cir. 2003) (plaintiff's “attempts to defend herself through the media against allegedly defamatory statements” did not make her a public figure). “An individual should not risk being branded with an unfavorable status determination merely because he defends himself publicly against accusations, especially those of a heinous character.” *Lluberes v. Uncommon Productions, LLC,* 663 F.3d 6, 19 (1st Cir. 2011). Court have found “no good reason why someone dragged into a controversy should be able to speak publicly only at the expense of foregoing a private person's protection from defamation.” *Foretich v. Capital Cities/ABC, Inc.,* 37 F.3d 1541, 1564 (4th Cir. 1994). The “actual-malice standard here would serve only to muzzle persons who stand falsely accused of heinous acts and to undermine the very freedom of speech in whose name the extension is demanded.” *Id.*

InfoWars also argued that its false statements about Sandy Hook were protected because some of the parents “inserted themselves into the controversy surrounding the Second Amendment.” Yet a general concern about the Second Amendment will not suffice. “The controversy must be about some specific question, not merely a general concern or interest.” *Cummins,* 2015 WL 1641144 at \*9. Moreover, it is required that “the alleged defamation is germane to the plaintiff's participation in the controversy.” *McLemore*, 978 S.W.2d at 573. The court must ask “whether the plaintiff is a public figure with respect to the topic of the publication.” *Fitzgerald,* 691 F.2d at 669. Here, the parents took no public steps “with respect to the topic of the publication,” as it was never their intention to participate in any public debate over whether the events at Sandy Hook were staged.

 **IV. Proving Actual Malice is not an Insurmountable Obstacle.**

Even if a crime victim is found to be a public figure, they could still maintain a successful defamation case if they can show the statement was made with actual malice. Malice exists in defamation when a publisher shows a “reckless disregard for the falsity of a statement.” *Bentley,* 94 S.W.3d at 591. A showing of actual malice can be satisfied when there is *prima facie* circumstantial evidence that a defendant would have “entertained serious doubts as to the truth of his publication.” *Warner Bros. Entm't, Inc. v. Jones,* 538 S.W.3d 781, 805 (Tex. App.—Austin 2017, pet. filed). A plaintiff may offer circumstantial evidence suggesting that a defendant made statements which he “knew or strongly suspected could present, as a whole, a false and defamatory impression of events.” *Turner v. KTRK TV, Inc.*, 38 S.W.3d 103, 120-121 (Tex. 2000).

Malice can be shown in many ways. For example, “inherently improbable assertions and statements made on information that is obviously dubious may show actual malice.” 50 Tex. Jur. 3d Libel and Slander § 133. Malice is shown when the circumstances were “so improbable that only a reckless publisher would have made the mistake.” *Freedom Newspapers of Tex. v. Cantu,* 168 S.W.3d 847, 855 (Tex. 2005). This burden becomes easier to meet when the subject matter of the defamation is a serious crime, because when a court assesses actual malice, it should “begin by noting the gravity of the accusations made against [plaintiff].” *Warner Bros. Entm't, Inc.,* 538 S.W.3d at 806. Serious charges “deserve a correspondingly high standard of investigation.” *Id.* In such a case, a publisher acts with malice where it “ignored elementary precautions” or “failed to meaningfully seek corroboration…from any other sources.” *Id.* at 808. Many modern internet-based publishers routinely ignore basic journalistic precautions in their haste to publish content, making this element easier to prove.

Prior statements made by the defendant or a course of harassing statements can also show malice. *See, e.g.,* *Beaumont v. Basham*, 205 S.W.3d 608, 624 (Tex.App. Waco. 2006) (Finding prior statements are “admissible under Rule 404(b) to show malice in a defamation suit.”); *D Magazine Partners,* 529 S.W.3d at 434 (Court must examine “the surrounding circumstances” and entire context, “and not merely on individual statements.”); 50 Am. Jur. 2d Libel and Slander § 462 (Collecting cases which hold that evidence of other defamations “either before or after the filing of the suit is admissible for the purpose of showing malice.”). Finally, personal statements about a plaintiff show “circumstantial evidence of the defendant's state of mind.” *Alaniz v. Hoyt*, 105 S.W.3d 330, 347 (Tex. App.—Corpus Christi 2003). Thus, “actual malice may be inferred from the relation of the parties.” *Warner Bros. Entm't, Inc.,* 538 S.W.3d at 805.

Rarely will a defendant openly admit to harboring doubts about the truth of his publication, and thus the law recognizes the necessity of circumstantial evidence when proving malice. In today’s media environment, it is often far easier to prove a publisher avoided the truth than it has been in the past. As such, a finding of public figure status is not the end of a modern defamation case.

**III. PROVING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN THE SANDY HOOK CASES.**

 **A. An IIED Claim is not Required to Show the Publication Referred to the Plaintiff.**

In October 2018, Kaster Lynch Farrar & Ball, LLP brought suit on behalf of Sandy Hook parent Scarlett Lewis. Ms. Lewis was not directly mentioned by any of the InfoWars videos or articles. As such, she did not sue for defamation, but under a theory of intentional infliction of emotional distress (IIED). Ms. Lewis sued based on false statements about the Sandy Hook tragedy which were not “of or concerning” her, but about the facts surrounding her son’s death. Some of these false statements included claims of “other shooters in the woods who fled, that port-a-potties had been delivered within an hour, that FBI crime statistics show no murders in Newtown in 2012, that EMTs were not allowed in the building, and that [an alleged parent’s] interview was faked using a blue-screen.” Mr. Jones falsely claimed the school “was rotting and falling apart in videos” and “that the children were going in circles, in and out of the building with their hands up” as part of “the big media event.” On other occasions, Jones falsely told his viewers the police were “finding people in the back woods who are dressed up in SWAT gear.” As detailed in Ms. Lewis’ petition, Mr. Jones continually told his viewers the event was staged by the government, and that the government “knew it was coming, stocked the school with kids, killed them, and then had the media there.” The extreme and outrageous conduct arose from a multitude of statements which are not defamatory to Ms. Lewis but are nonetheless outrageous and deeply upsetting.

Ms. Lewis’ IIED claim is not without precedent. In 2013, when the National Enquirer made a ghastly circus out of Natalee Holloway’s death in Aruba, her mother Beth Holloway was able to assert a claim for IIED. The court in *Holloway v. Am. Media* explained that “[p]ublication of false facts that are not ‘of and concerning’ the plaintiff cannot damage the plaintiff's reputation, which is an essential element of libel; publication of false facts may, however, serve to inflict severe emotional distress where the defendant ‘…knew or should have known that emotional distress to [her] would likely result.” *Holloway,* 947 F. Supp. 2d at 1264, *quoting Foretich v. Advance Magazine Publishers, Inc.,* 765 F.Supp. 1099, 1105 (D.D.C.1991). The cause of action is allowed because “[t]he limiting principles that the ‘of and concerning’ requirement provide in a libel case are similarly served in an outrage case by the intent element, and by general tort principles concerning foreseeability.” *Id.*

Earlier this year, Ms. Holloway brought another similar claim against Oxygen Media for making “several false statements of fact” in a television series about her daughter’s disappearance, and that suit also survived a motion to dismiss. *Holloway v. Oxygen Media, LLC*, 2:18-CV-00176-KOB, 2019 WL 121270, at \*8 (N.D. Ala. Jan. 7, 2019). As in the *Holloway* cases,InfoWars made reckless false statements about the circumstances of Sandy Hook which they knew would cause emotional distress to the parents.

Also this year, the Second Circuit agreed in *Rich v. Fox News Networks,* in which the court discussed Fox News’ knowledge of Seth Rich’s parents’ vulnerability as grieving parents after publishing recklessly false statements about the death of their son:

The Riches allege that the Appellees knew of their susceptibility to emotional distress, and their conduct became extreme and outrageous when the Appellees chose to proceed with their plan in spite of that knowledge. We agree…

*Rich v. Fox News Network, LLC,* 18-2321-CV, 2019 WL 4383204, at \*7 (2d Cir. Sept. 13, 2019). Citing the Restatement, the Second Circuit noted “knowledge of a plaintiff's susceptibility to emotional distress can…transform non-actionable acts into outrageous conduct.” *Id.* In *Rich,* the court noted the family made a public statement “noting how the nascent conspiracy theory was severely hurting them.” *Id.* The court also cited statements made by the defendants acknowledging the family’s distress. The court ruled that proceeding “in the face of this knowledge of the grieving family's susceptibility makes [defendants’] conduct plausibly extreme and outrageous.” *Id.* Likewise, InfoWars understood the pain it was causing the Sandy Hook parents, but it proceeded with outrageous disregard to their suffering.

InfoWars argued Ms. Lewis could not bring an IIED claim as a matter of law because she was not specifically targeted. InfoWars argued Ms. Lewis must be “the specific subject of defendants’ intentional conduct.” This question was examined in *Johnson v. Standard Fruit & Vegetable Co.*, which involved infliction of distress to a group of marchers across a bridge. The court stated, “[w]e see nothing in [Restatement] section 46(1) that excludes the situation when a defendant exercises extreme or outrageous conduct towards a group.” *Johnson v. Standard Fruit & Vegetable Co., Inc.,* 984 S.W.2d 633, 639 (Tex. App.—Houston [1st Dist.] 1997), *rev'd on other grounds*, 985 S.W.2d 62 (Tex. 1998). The court in *Johnson* declined to recognize a requirement “that liability for the tort of intentional or reckless infliction of emotional distress be based on outrageous conduct which is consciously *directed at* a particular individual.” *Id.* (emphasis in original). The court noted that “[i]n the absence of any authority or any compelling reason to engraft additional qualifications onto the word ‘directed,’ we decline to create a new element for this well established cause of action.” *Id.* at 640.

The court in Elizabeth Holloway’s case reached the same conclusion, rejecting the idea “that the ‘of and concerning’ element of a defamation claim also applies as a First Amendment limitation to a claim of intentional infliction of emotional distress,” noting “the different essential natures of the two torts.” *Holloway v. Am. Media, Inc.,* 947 F. Supp. 2d 1252, 1264 (N.D. Ala. 2013). Indeed, defendants can be indifferent to a plaintiff so long as they “anticipated that the plaintiff would suffer severe emotional distress.” *Senko v. BP Products North America, Inc*., 2009 WL 3673772, at \*6 (Tex.App.-Houston [1 Dist.],2009). The law does not require an intent to harm or malice towards a specific plaintiff, merely foreseeable risk.

In Scarlett Lewis’ case against InfoWars, the Texas Court of Appeals found that “Lewis established by clear and specific evidence a prima facie case,” and they affirmed the trial court’s denial of InfoWars’ anti-SLAPP motion. *Jones v. Lewis,* 03-19-00423-CV, 2019 WL 5090500, at \*4 (Tex. App.—Austin Oct. 11, 2019, no pet. h.). Ms. Lewis’ case joins a growing body of case law affirming a right of redress for reckless false statements about the circumstances of a deadly crime.

 **B. An IIED Claim Based on Public Speech Requires Reckless Falsity.**

An IIED claim is more flexible than a defamation claim in many ways. It does not require a statement specifically implicating the plaintiff, only a statement that would foreseeably cause distress. An IIED claim can also incorporate years of conduct under a “continuous course of conduct doctrine” in which “limitations begin to run as of the date the tortious conduct ceased.” Twyman v. Twyman, 790 S.W.2d 819, 821 (Tex.App.—Austin 1990). Yet this flexibility is tempered by the requirement that the defendant make false statements with actual malice.

The U.S. Supreme Court’s opinion in *Hustler* is particularly important. *Hustler* placed limitations upon a State’s authority to protect its citizens from the tort of intentional infliction of emotional distress. In *Hustler,* the Supreme Court set a standard requiring a false statement made with malice:

The First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress by reason of the publication of a caricature such as the ad parody at issue without showing in addition that the publication contains a false statement of fact which was made with “actual malice.”

*Hustler Magazine, Inc. v. Falwell,* 108 S. Ct. 876, 877 (1988). In other words, a statement must be false to be actionable, no matter how upsetting. This was illustrated in the U.S. Supreme Court’s later decision in *Snyder,* commonly known as the Westborro Baptist Church case. In *Snyder*, members of the church stood on a public sidewalk with signs reading “God Hate Fags” among other harassing slogans while protesting a military funeral. *Snyder v. Phelps*, 562 U.S. 443, 455 (2011). Westborro’s inflammatory opinions were immune from suit, but reckless false statements are not protected, and “it can be asserted fairly that the First Amendment protection described in *Snyder* does not extend to speech that is not ‘honestly’ believed.” *Holloway*, 947 F. Supp. 2d at 1262. Under this standard, “publication of false facts may, however, serve to inflict severe emotional distress where the defendant ‘…knew or should have known that emotional distress to [her] would likely result.” *Id.* at 1264, *quoting Foretich,* 765 F.Supp. at 1105. When making malicious false statements about crime victims, Mr. Jones crossed the line into actionable conduct.

**CONCLUSION**

In an our increasingly reckless media culture, crime victims are routinely subjected to revictimization through defamatory coverage and harassing exploitation. In the Sandy Hook cases, Mr. Jones smeared these shattered families with his malicious statements and fostered a dangerous community of obsessed conspiracy fanatics who threatened their safety. Despite the strength of anti-SLAPP laws, defamation and IIED lawsuits can help these victims if litigated properly.