THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2020-0496

DEBBIE BANAIAN

V.

ANN ELIZABETH BASCOM & a

MANDATORY APPEAL

FROM A FINAL DECISION OF THE

HILLSBOROUGH COUNTY SUPERIOR COURT, NORTHERN DISTRICT

BRIEF OF PLAINTIFF/APPELLANT

DEBBIE BANAIAN

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TABLE OF CONTENTS

TABLE OF CASES

QUESTIONS PRESENTED FOR REVIEW

I. Whether the retweeting Defendants are "users" within the meaning of the Communications Decency Act, 47 U.S.C. S 230 or otherwise immune from liability.

Transcript, page 8.

STATUTES INVOLVED IN THE CASE

47 U.S.C. § 230.
Protection for private blocking and screening of offensive material

(a) Findings
The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy
It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).1

[1] So in original. Probably should be "subparagraph (A)."

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under SECTION 1595 OF TITLE 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of SECTION 1591 OF TITLE 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of SECTION 2421A OF TITLE 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides

access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

STATEMENT OF THE CASE

This appeal arises from a defamation and reckless infliction of emotional distress action brought by plaintiff Debbie Banaian action against defendants Caiden Winchester, Cameron Tillman, and a group of individuals classified in the complaint as "re-tweeters". The plaintiff was a middle school teacher and the defendants were former students. (Compl. ¶ 1-4.)

The complaint alleged that Winchester hacked into the school website and changed Ms. Banaian's website page, which is designed for student and parent communication and information. The changes contained highly defamatory statements suggesting that Ms. Banaian wanted to have sex with her students and their parents. (Compl. ¶ 5.)

Defendant Tillman took a picture of the altered website and tweeted that image over Twitter. (Compl. ¶ 6.). That image was then retweeted by the "re-tweeter" defendants and within a matter of hours went viral throughout the school community subjecting Ms. Banaian to school wide ridicule. (Compl. ¶ 7.)

Multiple re-tweeter defendants filed Motions to Dismiss arguing that the claims are barred under the Communications Decency Act, 47 U.S.C. 230 (CDA) which prohibits civil actions against providers or users of an interactive computer service based on any information provided by another information content provider. The Court granted the motions. The plaintiff filed a Motion to Reconsider and after a hearing on the Motion, denied the motion to reconsider and dismissed the action.

SUMMARY OF ARGUMENT

A person who knowingly retweets defamatory information is not a "user" of an interactive computer service the CDA was designed to protect from defamation liability.

The CDA was passed in 1996 by Congress in response to two defamation lawsuits against internet service providers (ISPs) in the early 1990s that addressed whether the service providers should be considered publishers or distributors under the common law definitions applicable to defamation. The suits involved content posted on the ISP's website or message board, and was not information created by the ISP. One case found that an ISP is not a publisher, and could not be liable under the common law applicable to distributors because the ISP was merely an intermediary and had no opportunity to review the contents to become aware of its defamatory content. The other case found that the ISP became a publisher because it voluntarily took measures to screen the posts and remove or edit posts that contain objectionable material.

The express goal of the CDA was to encourage ISPs to keep the internet safe for children by allowing ISPs to edit or remove user-generated content of a purient nature without becoming liable for the content. Congress sought to immunize the removal of user generated content, not the creation of content. Providing immunity to individual users does not further the Policy set forth in Section 230.

ARGUMENT

A. What does Congress Mean by the Phrase User of an Interactive Computer Service.

The Superior Court recognized that the vast majority of the reported cases that address whether a defendant is immune from suit under Section 230 involve internet service providers (ISPs), and not individual users. The Court adopted the reasoning of a 2006 California Supreme Court case that squarely addressed "user" liability in a case where the individual had no supervisory role in the operation of the internet site where the allegedly defamatory material appeared. This was an important distinction because one of the principal policy considerations for alleviating ISPs from publisher liability is the massive volume of third-party postings that providers encounter. If the ISP was required to review each post for possible defamatory context, this would have a large impact on the stated policy in section 230 (b)(1) of "promoting the continued development of the internet and other interactive computer services and other interactive media."

The California Supreme Court in **Barrett v. Rosenthal**, 146 P.3d 510 (2006) observed that "user" is not defined in the statute, and stated that the limited legislative record does not indicate why Congress included users as well as service providers under the umbrella of immunity granted by section 230(c)(1). While the Barrett court provided a thorough analysis of the legislative history to support its conclusion, it started its analysis by resorting to standard statutory construction and used the ordinary dictionary meaning of

the word to conclude the term refers to anyone who uses something, in this case, an interactive computer service.

The legislative history, which reveals what Congress hoped to accomplish with the CDA, does not support the conclusion that Congress was referring to individual users. Not all ISP's are interactive computer services. A simple Google search of what is ISP and examples will reveal companies such as AT&T, Verizon, Comcast that provide internet access to companies. It is logical to conclude that the users Congress was referring to were the other companies, in addition to interactive computer service providers, that made the internet work.

In 1996 people accessed the internet and used websites in a much more limited capacity. The term "user" of an interactive computer service should be interpreted to mean libraries, colleges, computer coffee shops, and companies that at the beginning of the internet were primary access points for many people. This is supported by the express Policy found in Section 230(b)(3). Congress needed to include those type of businesses/entities that "use the Internet" and may want to employ the blocking and screening tools which is what the CDA was all about.

The US Supreme Court case of **Reno v. American Civil Liberties Union**, 521 U.S. 844 (1997) contains an illuminating history of the internet by Justice Stevens which suggests "user of an interactive computer service" means something entirely different than an individual person surfing the web and then posting fake information found on a dubious website.

> Individuals can obtain access to the Internet from many different sources, generally hosts themselves or entities with a host affiliation. Most colleges and universities provide access for the students and faculty; many corporations provide employees with access through an office network; many communities and local libraries provide free access; and an increasing number of storefront "computer coffee shops" provide access for small hourly fee. Several major national "online services" such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet. These commercial online services had almost 12 million individual subscribers at the time of trial [1996]". **Id**., at 845.

B. The CDA was Needed to Allow Websites to Remove Pornographic Material Without Facing Defamation Liability as a Publisher of the Content.

The 26 words that created the internet contained in 47 U.S.C. §230 (c)(1) started its life known as the Online Family Empowerment Act. This court had the recent opportunity to explore the expansive reach and immense power of those 26 words in **Teatotaller, LLC v. Facebook, Inc**., NH Supreme Court Slip Opinion dated July 24, 1990, Case No. 2019-0328. In that case this court observed, with citations omitted for ease of flow, as follows:

> Congress enacted this statute partially in response to court cases that held internet publishers liable for defamatory statements posted by third parties on message boards maintained by the publishers. Section 230(c) limits this sort of liability in two ways. First, under section 230(c)(1), it shields website operators from being treated as the publisher or speaker of material posted by users of the site. Relatedly, [under section 230(c)(2),] it allows website operators to engage in blocking and screening of third-party content, free from liability for such good-faith efforts.

And of course, this court was precisely right. In 1996, during the infancy stage of the internet, prior to the dawning of social media (SixDegrees.com was founded in 1997, "The" Facebook was launched in February, 2004)) and the present day where every child in grade school seems to have a smart phone, Congress was concerned about children having unfiltered access to "objectional material". The unreported New York case of **Stratton Oakmont v. Prodigy Services Co.** (N.Y. Sup Ct. May 24, 1995) was prominently mentioned in the House hearing:

Mr. Chairman, what we want are results. We want to make sure we do something that actually works. Ironically, the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.

I will give you two quick examples: A Federal court in New York, in a case involving CompuServe, one of our on-line service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.

But another New York court, the New York Supreme Court, held that Prodigy, CompuServe's competitor, could be held liable in a $200 million defamation case because someone had posted on one of their bulletin boards, a financial bulletin board, some remarks that apparently were untrue about an investment bank, that the investment bank would go out of business and was run by crooks.

Prodigy said, ``No, no; just like CompuServe, we did not control or edit that information, nor could we, frankly. We have over 60,000 of these messages each day, we have over 2 million subscribers, and so you cannot proceed with this kind of a case against us.''

The court said, ``No, no, no, no, you are different; you are different than CompuServe because you are a family-friendly network. You advertise yourself as such. You employ screening and blocking software that keeps obscenity off of your network. You have people who are hired to exercise an emergency delete function to keep that kind of

[[Page H 8470]]

material away from your subscribers. You don't permit nudity on your system. You have content guidelines. You, therefore, are going to face higher, stricker liability because you tried to exercise some control over offensive material.''

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Mr. Chairman, that is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact every one of us will be able to tailor what we see to our own tastes.

We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents. That is where we should be headed, and that is what the gentleman from Oregon [Mr. Wyden] and I are doing.

Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, it will establish as the policy of the United States that we do not wish to have content regulation by

> the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.
>
> There are other ways to address this problem, some of which run head-on into our approach. About those let me simply say that there is a well-known road paved with good intentions. We all know where it leads. The message today should be from this Congress we embrace this new technology, we welcome the opportunity for education and political discourse that it offers for all of us. We want to help it along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us.

> This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services. (H.R.Rep. No. 104-458, 2d Sess., p. 194 (1996).)

Although titles or captions may not be used to contradict a statute's text, they can be useful to resolve textual ambiguities and inform the reviewing court of Congress' intent. See **Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co**., 331 U.S. 519 (1947); **Berniger v. Meadow Green-Wildcat Corp.**, 945 F.2d 4, 9 (1st Cir. 1991). The tile of Section 230 is "Protection for private blocking and screening of offensive material." The title for §230 (c)(1) "Protection for "Good Samaritan" blocking and screening of offensive material". Nowhere in the text of Section 230, or its legislative history is there any suggestion that immunizing the very people who would perhaps be placing the objectional material on the internet (individual users) was the goal of the CDA.

C. Because the CDA Changes the Common Law of Defamation, the Statute Must Speak Directly to Immunizing Individual Users.

"Statutory interpretation is a question of law that we review de novo." **EnergyNorth Natural Gas v. City of Concord**, 164 N.H. 14 (2012) **See Petition of Estate of Braiterman**, 169 N.H. 217, 221 (2016). We interpret federal statutes and regulations "in accordance with federal policy and precedent." Id. (quotation omitted). "When interpreting statutes and regulations, we begin with the statutory or regulatory language, and, if possible, construe that language according to its plain and ordinary meaning." Id. "Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation." Id. "This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." **Petition of Eskeland**, 166 N.H. 554, 558 (2014) (quotation omitted). "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." **Eaton v. Eaton**, 165 N.H. 742 (2013) (quotation omitted).

"Statutes which invade the common law . . . are to be read with a presumption favoring retention of long-established and familiar principles, except when a statutory purpose to the contrary is clearly evident. [citations omitted]. In such cases, Congress does not write upon a clean slate. [Citation omitted]. In order to abrogate the common-law principle, the statute must speak directly to the question addressed by the common law." **United States v. Texas**, 507 U.S. 529, 534 (1993).

Section 230 (d) gets to the heart of the blocking desires of Congress when it requires interactive computer services to notify its customers (not users) that parental control protections are available that may assist the customer in limiting access to material that is harmful to minors. Congress was focused on allowing the IPSs to self police the internet, not incentivizing individual users by providing the customers with immunity.

The re-tweeter defendants would be subject to defamation liability under the common law. The material being retweeted was clearly false and defamatory. Each student would know it was false, and chose to distribute the tweet to each of their own followers by retweeting. Providing immunity to these individual users does not keep our children from being exposed to harmful content.

CONCLUSION

Nothing in the text of Section 230, or in the legislative history suggests that Congress intended to provide immunity to individual users of a website. This court should interpret the phrase "users of interactive computer service" to mean "computer Good Samaritans, online service providers, anyone who provides a front end to the Internet who takes steps to screen indecency and offensive material for their customers." This is precisely what Congressman Cox thought his amendment was accomplishing.

DECISIONS BELOW THAT ARE BEING APPEALED

I hereby certify that the decisions of the Hillsborough County Superior Court, Northern District. decisions are in writing and are appended to this Brief.

REQUEST FOR ORAL ARGUMENT AND CERTIFICATIONS

Attorney Brian Shaughnessy will present the oral argument on behalf of the Appellant. Fifteen minutes is requested. This is a case novel issue of law and oral argument will assist the Court to explore matters of public policy.

Pursuant to Rule 26(7), I certify that this Brief contains 4960 words and is in compliance with Rule 16 (11).

I hereby certify that a copy of the foregoing has been delivered through the electronic filing system on May 13, 2021 to all registered e-filers.

May 13, 2021

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Debbie Banaian

v.

Caiden Winchester, et al.

Docket No. 216-2019-CV-00418

ORDER

Plaintiff Debbie Banaian brings this defamation and reckless infliction of emotional distress action against Defendants Caiden Winchester, Cameron Tillman, and a group of individuals she classifies as "re-tweeters". Banaian alleges that Winchester posted defamatory information about her online, which was posted to Twitter by Tillman and retweeted by the "re-tweeter defendants". The defendants that have been identified by Banaian as the retweeter defendants are: Shannon Bossidy, Emily Knouse, Timothy R. Brodeur, Katie Moulton, Kyle Tucker, Bryan Gagnon, Emily John, Jacob D. MacDuffie, Ryan Defina, Ann Elizabeth Bascom, Ethan Hollen, Christian Sabina, Aaron Bliss, Todd Hults Jr., and Benjamin M. Wright (hereinafter "retweeter defendants" collectively).

Gagnon, Bliss, Moulton, Bossidy, and MacDuffie have filed motions to dismiss. Banaian objects. Although Banaian requests a hearing in her objections, the Court concludes that a hearing will not aid in determining the pending issues. Accordingly, the Court acts on the motions on the basis of the pleadings and the record before it, see Super. Ct. R. 13(b), and GRANTS the motions to dismiss.

Factual Background

The following facts are taken from Banaian's Complaint. Banaian was a teacher at Merrimack Valley Middle School. (Compl. ¶ 1.) Winchester and Tillman were students at Merrimack Valley High School. (Id. ¶ 2-3.) The retweeter defendants are "believed to be students at Merrimack Valley High School" and are identified in the original Complaint by their Twitter accounts and usernames:

> Emily John @Emilyjohn
> Jared Kushner @B_Enwright
> Tvdd6 @todd_hults
> aaron bliss @aaronblissss
> Christiaian Sabina @cubefish420
> Ethan Hollen @Ethan_Hollen
> jay @jayleneeeexoxo
> Ann Bascom @ann_b10
> Jake MacDuffie @jmacduffie
> emma @emmaadavi_s
> emily @xx_emilyyyd
> Bryan Gagnon @BryanGagnon
> Kyle Tucker @Kyle_tucker42
> Rock/fatcunt @briianachaput
> Katie Moulton @KatieeMoulton
> Kmoulton @motocross_44
> Maggie Deriso @Maggiederiso
> Tim Brodaa @timebroda
> Shannon @shananaon123

(Id. ¶ 4.) The retweeter defendants were later identified by Banaian's investigator by their names. (Doc. 5.) On May 17, 2016, Winchester "hacked the Merrimack Valley Middle school website and changed Ms. Banaian's website," creating a post that "suggest[ed] that Ms. Banaian was sexually pe[r]verted and desirous of seeking sexual liaisons with Merrimack Valley students and their parents." (Compl. ¶ 5.) Banaian

alleges this is the defamatory statement.[1] Tillman then "took a picture of the altered website and tweeted that image over Twitter." (Id. ¶ 6.) Tillman's tweet was retweeted by the retweeter defendants. (Id.) Banaian claims that she was subject to "school-wide ridicule" because of the "viral" post, became unable to function as a teacher, and was "unable to resume her employment for approximately 6 months." (Id. ¶ 7-8.) She claims she has suffered financial, emotional, physical, and reputational harm as a result. (Id. ¶ 8-9.)

Standard of Review

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015). The Court "need not, however, assume the truth of statements that are merely conclusions of law." Id. "The trial court may also consider documents attached to the plaintiff's pleadings, or documents the authenticity of which are not disputed by the parties[,] official public records[,] or documents sufficiently referred to in the complaint." Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 711 (2010). "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

[1] No party has submitted to the Court the exact statements that were made.

Legal Analysis

Defendants Gagnon, Bliss, Moulton, Bossidy, and MacDuffie argue that Banaian's claims are barred by the Communications Decency Act (CDA), 47 U.S.C. § 230. The relevant section of the CDA is § 230(c), entitled "Protection for 'Good Samaritan' blocking and screening of offensive material," which states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). "Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). The statute limits the immunity conferred under § 230 such that it shall not be construed to: (1) impair enforcement of federal criminal statutes or federal statutory provisions relating to obscenity or sexual exploitation of children; (2) limit or expand law pertaining to intellectual property; (3) prevent States from enforcing State law consistent with § 230 or allow any cause of action to be brought or liability to be imposed under any State or local law inconsistent with § 230; (4) limit the application of electronic communications privacy law, and (5) limit or impair sex trafficking law. § 230(e)(1)-(5).

Section 230 defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." § 230(f)(2). Twitter falls within this definition. See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) ("Today, the most common interactive computer services are websites."); Fields v. Twitter, Inc., 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016)

("Plaintiffs do not dispute that Twitter is an interactive service provider . . . ."). The retweeter defendants, as users of Twitter, are thus users of an interactive computer service. See Barrett v. Rosenthal, 146 P.3d 510, 527 (Cal. 2006) ("'User' plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service.")

The immunity granted through § 230(c) applies only if the interactive computer service provider or user does not meet the definition of "information content provider." See Roommates.com, 521 F.3d at 1162. Section 230 defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." § 230(f)(3). Thus, for Banaian to pierce the broad immunity offered by § 230, she needs to show that the retweeter defendants created or developed "in whole or in part" any of the allegedly defamatory content.

In order to address this matter, the Court finds it necessary to briefly describe the social media interaction at issue. "Twitter is a social media platform . . . with more than 300 million active users worldwide." Campbell v. Reisch, 367 F. Supp. 3d 987, 989 (W.D. Miss. 2019). "Twitter enables users to publish short messages to the general public called 'tweets,' to republish or respond to others' tweets, and to interact with other uses." Id. "A user may comment on other users' tweets, or 'retweet' their tweets to her own followers." Id. "A user '[r]etweets' a [t]weet when he or she elects to publish the original [t]weet in full on his or her Twitter profile. A [r]etweet shows the original [t]weet in full, including attribution to the person who originally published the [t]weet." McNeil v.

Biaggi Prods., LLC, No. 3:15cv751, 2017 WL 2625069 at *2 n.9 (E.D. Va. June 16, 2017).

The parties agree on what conduct the retweeter defendants committed: each retweeter defendant retweeted a picture posted to twitter by Tillman of the website hack perpetuated by Winchester. Banaian claims that retweeting is enough to make the retweeter defendants responsible for the creation or development of the allegedly defamatory content because retweeting another's post is adopting that tweet and re-branding it as the retweeter's own. The retweeter defendants argue that mere retweeting is not creation, and that the proper target for Banaian's claims is either or both Winchester and Tillman, as they are the ones who posted the content originally on the school's website and Twitter, respectively.

One of the few cases that discusses § 230 immunity as to users, and not internet service providers, is Barrett v. Rosenthal, 146 P.3d 510. In Barrett, the plaintiffs alleged that the defendants "committed libel by maliciously distributing defamatory statements in e-mails and Internet postings" and that the defendants republished messages after a warning from the plaintiff. Id. at 513-14. After considering the legislative history of § 230 (c) (1) and undertaking a thorough statutory analysis, the California Supreme Court held that "[b]y declaring that no 'user' may be treated as a 'publisher' of third party content, Congress has comprehensively immunized republication by individual Internet users." Id. at 529.

The Barrett court declined to adopt "any operative distinction between 'active' and 'passive' Internet use." Id. Noting that "[a]ll republications involve a 'transformation' in some sense," the court stated, "[t]he scope of the immunity cannot turn on whether

the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance." Id. at 528. The court rejected the view "that actively selected and republished information is no longer information provided by another information content provider." Id. "A user who actively selects and posts material based on its content fits well within the traditional role of 'publisher.' Congress has exempted that role from liability." Id.

The Court finds this analysis from Barrett compelling. Retweeting another user's tweet is a form of republication: it does not involve the creation or the development of original content. See Mitan v. A. Neumann & Assocs., LLC, No. 08-6154, 2010 WL 4782771 at *4 (D.N.J. Nov. 17, 2010) ("[Section 230] provide[s] immunity from common law defamation claims for persons who republish the work of other persons through internet-based methodologies, such as websites, blogs, and email."); Hoang v. BBC Global News Ltd., No. 56-2018-00507910-CU-CF-VTA, 2018 WL 7372013 at *6 (Ca. Super. Ct. Dec. 6, 2018) (holding that the BBC reposting commentary to its Facebook page "was not responsible, in whole or in part, for the creation or development of the offending content" and such "reposting of alleged defamatory statements . . . fall[s] within the immunity protection of [§] 230"). Banaian's entire defamation claim rests with the content originally tweeted by Tillman. Even though a retweet does attribute the original content to the retweeting user, and a Twitter user can choose what content to republish on their account, the retweeting user has "simply hit the forward icon on his computer," Mitan, 2010 WL 4782771 at *5, by clicking the analogous "retweet" icon and republishing someone else's content. These actions are shielded by § 230.

Banaian claims that the retweeter defendants' conduct amounts to a criminal conspiracy and is therefore outside the scope of § 230 immunity. Even if the Court were to accept the proposition that the retweeter defendants were engaged in a conspiracy, Banaian has not pled any facts that show the retweeter defendants committed any action that amounts to creation or development of the defamatory statement. Further, this case does not involve a claim of criminal conspiracy, but defamation and reckless infliction of emotional distress—torts that Congress chose to immunize when passing § 230. See Zeran, 129 F.3d at 330-31 ("Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediates for other parties' potentially injurious messages."); Roommates.com, 521 F.3d at 1163 ("One of the specific purposes of [§ 230] is to overrule [Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995),] and any other similar decisions which have treated such providers as publishers or speakers of content that is not their own because they have restricted access to objectionable material.")[2] (citing H.R. Rep. No. 104-458 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 10). Although Banaian claims that "[t]he purposeful destruction of the lives of innocent human beings is not immunized," (Pl.'s Obj. to Def. Gagnon's Mot. to Dismiss ¶ 18), Congress did not carve out an exception for material that could be deemed harmful online speech when it immunized providers and users from claims based on content created by third parties. Therefore, Banaian's

[2] The court in Stratton Oakmont held that Prodigy became a "publisher" when it voluntarily deleted messages from its message boards "on the basis of offensiveness" and "bad taste" because it "uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards." 1995 WL 323710 at *4.

argument that her claims may survive § 230 immunity because the retweeter defendants are involved in a conspiracy must fail.

For the same reason, Banaian's argument that her reckless infliction of emotional distress claim may continue because it is consistent with the CDA also fails. As noted above, Congress did not distinguish between potentially injurious messages from more innocuous ones. See Zeran, 129 F.3d at 331. Section 230 immunity extends to "*any claim* that would treat [the user] as the publisher" of information provided by another information content provider. Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007) (emphasis added); see also Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content."); Zeran, 129 F.3d at 330-31. Allowing Banaian to proceed with her claim of reckless infliction of emotional distress against the retweeter defendants would allow her to hold them liable "as the publisher or speaker of [ ] information provided by another information content provider," the type of conduct Congress specifically sought to immunize through § 230.

Because Banaian's claims as against the retweeter defendants, who are alleged to have retweeted the purportedly defamatory content originally published by Winchester and Tillman, are barred by § 230, the motions to dismiss (Docs. 18, 19, 21, 30, and 40) are GRANTED.

As the Court's finding on § 230 is dispositive, the Court declines to reach the issue of whether the claims against Defendants Bossidy and MacDuffie are barred by the statute of limitations.

SO ORDERED.

February 12, 2020
Date

Judge Amy B. Messer

Clerk's Notice of Decision
Document Sent to Parties
on 02/18/2020

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Docket No.: 216-2019-CV-00418

Debbie Banaian

v.

Caiden Winchester, et al.

ORDER

The Court GRANTS Defendant Jacob D. MacDuffie's Motion For Court To Direct That Its Order Dated February 12, 2020, Be Treated As Final Decision On The Merits and orders as follows:

1. The Court directs that ~~the~~ its order Dated February 12, 2020, be treated as a final decision on the merits pursuant to Superior Court Rule 46(c)(1).
2. The Court finds that treatment of that order as a final decision on the merits is fair in light of the fact the claims against the remaining defendants would be unaffected thereby. The interests of justice will further be served by not unduly delaying any appeal Plaintiff may file as to the February 12, 2020, order.
3. The Court also finds that there is an absence of any just reason for delay as to the parties or claims that are hereby severed from the remainder of the case.
4. Defendant has filed no object or other response to Defendant MacDuffie's motion for the order on the motion to dismiss to be treated as a final order. The dismissal is with prejudice.

SO ORDERED.

Date

Amy B. Messer

Honorable Amy B. Messer
October 5, 2020

Clerk's Notice of Decision
Document Sent to Parties
on 10/05/2020

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

Debbie Banaian

v.

Caiden Winchester, et al.

Docket No. 216-2019-CV-00418

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff Debbie Banaian brings this defamation and reckless infliction of emotional distress action against Defendants Caiden Winchester, Cameron Tillman, and a group of individuals she classifies as "retweeters." The retweeter defendants are Shannon Bossidy, Emily Knouse, Timothy R. Brodeur, Katie Moulton, Kyle Tucker, Bryan Gagnon, Emily John, Jacob B. MacDuffie, Ryan Defina, Ann Elizabeth Bascom, Ethan Hollen, Christian Sabina, Aaron Bliss, Todd Hilts Jr., and Benjamin M. Wright.

Gagnon, Bliss, Moulton, Bossidy, and MacDuffie filed motions to dismiss, which this Court granted on February 12, 2020. In its order, the Court found that pursuant to the Communications Decency Act (CDA), 47 U.S.C. § 230, the retweeter defendants' actions were immune from Banaian's suit. Banaian now moves to reconsider to which Bossidy, Moulton, and MacDuffie object. A hearing was held on May 21, 2020. For the reasons that follow, Banaian's motion to reconsider is DENIED.

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." Super. Ct. R. 12(e). Banaian

raises a number of arguments that the Court will address in turn.

First, Banaian argues that the Court erred by deciding to not hold a hearing on the motions to dismiss. She argues that a hearing is "virtually guaranteed" according to Superior Court Rule 12. (Pl.'s Mot. Reconsider at 1.) Banaian mischaracterizes this rule. Rule 12(d) states: "Upon request of a party, hearings on motions to dismiss shall be scheduled as soon as practicable, but no later than 30 days prior to the date set for trial on the merits, unless the court shall otherwise order in the exercise of discretion." Further, Rule 13(b) requires a party that requests oral argument to "set[] forth by brief memorandum, brief statement or written offer of proof the reasons why oral argument or evidentiary hearing will further assist the court in determining the pending issue(s)" and if not, "no oral argument or evidentiary hearing will be scheduled and the court may act on the motion on the basis of the pleadings and the record before it." These rules "clearly impl[y] that the superior court has discretion to deny a requested oral argument or evidentiary hearing if the proffered reasons for holding a hearing are insufficient." Provencher v. Buzzell-Plourde Assocs., 142 N.H. 848, 852 (1998) (interpreting former Superior Court Rule 58).

In her objection to the motion to dismiss, Banaian did not explain why a hearing would further assist the court in determining the pending issues. Although the Court properly exercised its discretion in denying a hearing on the motion to dismiss, the Court held a hearing on her motion to reconsider. Therefore, Banaian's argument on this point is moot.

Second, Banaian argues that it is not a reasonable construction of section 230 to immunize users. Banaian does not contend that the court overlooked any law or

misapprehended her arguments when it concluded that users are subject to section 230's immunity provisions; in fact, the statute clearly applies to a "provider or user of an interactive computer service." § 230(c)(1) (emphasis added). Banaian raises only policy arguments about the usefulness or appropriateness of section 230 in today's society—a topic that is the subject of scholarly debate, see, e.g., Danielle Keats Citron & Benjamin Wittes, Symposium, The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity, 86 FORDHAM L. REV. 401 (Nov. 2017) (proposing that section 230 immunity is applied too broadly), but not one for the Court to decide when the statute's plain language identifies users as subject to immunity from suit.

Third, Banaian argues, without citation, that a retweet's attribution to the retweeting user shapes the content of the tweet, thereby removing the retweet from the immunity provisions of section 230. She argues that "[t]he effort to shape content is more than merely hitting a computer button." (Pl.'s Mot. Reconsider at 4.) At the hearing, she argued that because the CDA and Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006), predate Twitter and "active" internet usage, the statutory definition of "user" must take on a different meaning.

Banaian's argument misses the central point of section 230: that "[n]o . . . user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." § 230(c)(1) (emphasis added). As the Court stated in its prior order, Banaian must show that the retweeter defendants are "responsible, in whole, or in part, for the creation or development of information" in order to remove the retweeter defendants from section 230 immunity. § 230(f)(3) (emphasis added). Importantly, she does not allege that any retweeter

added any original content to Tillman's original tweet. This mere reposting of content provided by another, even if it is "re-shaped" by the nature of its repost, falls plainly within section 230's immunity provision. See Roca Labs, Inc. v. Consumer Op. Corp., 140 F. Supp. 3d 1311, 1321 (M.D. Fl. 2015) (finding that "the addition of a [Twitter] handle that reads '@rocalabs' or '@pissedconsumer' and a link to the tweet" was "a far cry" from the creation or development of content described in Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)).

The Court acknowledges the lack of cases applying section 230's immunity provision specifically to retweets and to users of Twitter. However, analogous case law exists discussing the application of section 230 immunity to forwarding or reposting content through other social media. See Obado v. Magedson, 612 Fed. Appx. 90 (3d Cir. 2015) (discussing the republication of content originating from one blog post on various websites), Directory Assistants, Inc. v. Supermedia, LLC, 884 F. Supp. 2d 446, 451 (E.D. Va. 2012) (finding users who forwards content posted by another via email immune from liability); Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288 (D.N.H. 2008) (discussing reposting an AdultFriendFinder profile to other websites); Phan v. Pham, 105 Cal. Rptr. 3d 791 (Cal. Ct. App. 2010) (discussing comments added when forwarding an allegedly defamatory email); Hoang v. BBC Glob. News Ltd., No. 56-2018-00507910-CU-CF-VTA, 2018 WL 7372013 (Cal. Super. Ct. Dec. 6, 2018) (discussing the sharing of a blog post on the BBC Vietnamese Facebook page).

Even if Congress did not envision the Internet of 2020 when it passed the CDA in 1996, see, e.g., Andrew C. Payne, Note, Twitigation: Old Rules in a New World, 49 WASHBURN L.J. 841, 843-45 (Spring 2010) (comparing the late-1990's Internet "web

1.0," characterized by a "one-way" flow of information, to the mid-to-late-2000's Internet "web 2.0," a more dynamic structure that involves "the sharing of information among users"), Congress chose to immunize all users who reposted the content of others, regardless of their level of engagement. Banaian's argument advocating for different levels of immunity to "passive" and "active" users holds no water in either the statutory text or in other courts' interpretations of section 230. See § 230(c)(1) (granting immunity to "users"); Barrett, 146 P.3d at 529 (declining to adopt "any operative distinction between 'active' and 'passive' Internet use"); Directory Assistants, 884 F. Supp. 2d at 452 (defining a "user" as "someone who uses"). Ultimately, Banaian has not presented any case or argument that convinces the Court it has misapplied the current law of section 230 to Twitter or persuaded the Court to adopt such a unique interpretation of section 230.

Fourth, Banaian claims the Court misapprehended her argument regarding conspiracy. Relying solely on a concurring opinion to Barrett, 146 P.3d at 529 (Moreno, J., concurring), she argues that she has pled a "sham" transfer of information "with the multiple re[]tweets constituting a mere vehicle for defamation." (Pl.'s Mot. Reconsider at 4.) By showing that the retweeter defendants were jointly engaged, she argues, section 230 immunity is destroyed.

In his concurrence, Justice Moreno took the position that "[section 230] immunity would not apply if the 'user' is in a conspiracy with the 'information content provider' providing the information." Barrett, 146 P.3d at 529. He interprets section 230 immunity arising in situations only where there was "an authentic transfer of information between two independent parties." Id. at 530. "When . . . two parties conspire to defame

someone, agreeing that one party will play the role of 'user' and the other, judgment proof, party will play the role of original 'content provider,' then the transfer of information that occurs between the two is a sham, a mere vehicle for the defamation." Id. However, he concluded that the plaintiffs in that case did not "establish a prima facie case of conspiracy to defame [the plaintiff], i.e., a preconceived plan and unity of design and purpose on the part of [the defendants] to defame." Id. at 531.

Even if the Court were to adopt the concurrence's reasoning (which it is not obligated to do), Banaian has not made a prima facie claim of conspiracy under New Hampshire law.[1] "[T]he elements of a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished . . . ; (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." In re Appeal of Armaganian, 147 N.H. 158, 163 (2001); see also Jay Edwards, Inc. v. Baker, 130 N.H. 41, 47-48 (1987). Nowhere does Banaian allege that the retweeter defendants had an agreement to spread the allegedly defamatory tweet, nor has she pled any facts in her complaint to support such an inference.

Finally, Banaian argues that the Court ignored the matter of criminal defamation in its original order. She argued at the hearing that section 230 should not preclude a civil action when the retweeter defendants' actions amount to criminal defamation.

Even assuming that the retweeter defendants' actions rise to the level of criminal conduct, section 230 immunizes that conduct from civil action and liability. Section 230(e)(3) states: "Nothing in this section shall be construed to prevent any state from

[1] Justice Moreno's concurrence appears to rely on the definition of civil conspiracy under California law and does not suggest a different or lower standard to apply in cases alleging a conspiracy to defame. See Barrett, 146 P.3d at 530 (Moreno, J., concurring). Therefore, the Court looks to apply the elements of civil conspiracy under New Hampshire law.

enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[2] In other words, "[s]ection 230(e)(3) provides teeth to [section] 230(c)(1) by barring all state[-]based suits 'inconsistent' with the statute." Ascentive, LLC v. Op. Corp., 842 F. Supp. 2d 450, 472-73 (E.D.N.Y. 2011).

Banaian essentially argues, without citation, that imposing liability on the retweeter defendants for conduct that amounts to criminal defamation is consistent with section 230 and granting them immunity leads to absurd results that were unintended by Congress. However, imposing liability on the retweeter defendants for retweeting content that they did not create, whether or not such action amounts to criminal conduct, is squarely inconsistent with section 230. "[T]he plain language of the statute contemplates application of immunity from civil suit under section 230 for interactive computer service providers [and users] even when the posted content is illegal, obscene, or otherwise may form the basis of a criminal prosecution." GoDaddy.com, LLC v. Toups, 429 S.W.3d 752, 760 (Tex. Ct. App. 2014); see also Zeran v. America Online, Inc., 129 F.3d 327, 334 (4th Cir. 1997) ("While Congress allowed for the enforcement of any state law that is consistent with [section] 230, it is equally plain that Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action.") (quotation and citation omitted). Characterizing the retweeter defendants' conduct as criminal does not change the essential fact that Banaian's defamation claim seeks to treat users of an interactive computer service who republished information provided by another as the publisher or

[2] Notwithstanding section 230(e)(3), the CDA does not explicitly state that Section 230 shall not impair the enforcement of state criminal law as it does with regard to federal criminal law. See § 230(e)(1).

speaker of that content. See Universal Comm. Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007); see also § 230(c)(1). It is under these circumstances, as the Court explained in its prior order, that section 230 immunity is granted.

As the Court stated in its prior order, it was the policy choice of Congress to immunize conduct as is alleged in this case through section 230. It is not for this Court to decide whether Congress' decision was a good or bad one. In light of the foregoing, the Court's decision that immunity offered under section 230 applies to the retweeter defendants remains unchanged. Accordingly, Banaian's motion for reconsideration is DENIED.

SO ORDERED.

May 28, 2020
Date

Amy B. Messer
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 05/28/2020