

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
DOCKET NO. 2020-496

DEBBIE BANAIAN

v.

ANN ELIZABETH BASCOM, ET AL

MANDATORY APPEAL
FROM A FINAL DECISION OF THE
HILLSBOROUGH SUPERIOR COURT, NORTHERN DISTRICT

MEMORANDUM OF LAW OF DEFENDANT SHANNON BOSSIDY

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STATEMENT OF FACTS

Similarly to all of the re-tweeters, Bossidy was not originally named in the original complaint, was not served with a copy of that complaint, and was not made aware of this action more than three years after the statute of limitations had run in November 14, 2019. In her sparsely pled complaint, Banaian alleges that Caiden Winchester “hacked the Merrimack Valley Middle School website and changed Ms. Bannaian’s [sic] website.” Compl. ¶ 5. Banaian further alleges that Cameron Tillman “took a picture of the altered website and tweeted that image over Twitter.” Compl. ¶6. In a complaint full of unfounded conclusory statements, Banaian alleges that Bossidy, who was not identified by last name in the original complaint, along with the other re-tweeters re-tweeted an image posted by Tillman of a website hacked and edited by Winchester. Id.. Bossidy, along with many of the re-tweeters, moved for a dismissal on the basis that the claims alleged by Banaian were both barred by the Communications Decency Act (the “CDA”) and the statute of limitations.

The trial court properly dismissed the claims against Bossidy and the re-tweeters as barred by the CDA.¹ The trial court correctly dismissed Banaian’s claims against Bossidy and the other re-tweeters as they were “user[s] of an interactive computer service” and therefore could not be “treated as the publisher[s] or speaker[s]” of the alleged defamatory content created by Winchester and published by Tillman under the CDA.

¹ The trial court did not opine on the statute of limitations argument raised by Bossidy and others.

ARGUMENT

As pled by Banaian in her Complaint, Winchester created the false content Banaian complains of and Tillman published that content on Twitter. Then, after Tillman published the content, the re-tweeters purportedly re-tweeted Winchester's content. Banaian erroneously attempts to impute Winchester and Tillman's liability to the re-tweeters even though there are no allegations that Bossidy or any of the other re-tweeters either expanded upon Winchester's content, made any comments regarding the content posted by Tillman, or took any steps or create or develop the content created by Winchester and published by Tillman. Per Banaian, all Bossidy and the re-tweeters did was hit retweet on Twitter.

Banaian's argument is predicated upon Banaian's unfounded belief that irrespective of the express language of the CDA, which prohibits treating Bossidy and the re-tweeters as "publisher[s] or speaker[s]" of the false content created by Winchester and published by Tillman and numerous jurisdictions who have held the same as true, this Court should take the unique position that the CDA only protects "Good Samaritans" and not "provider[s] or user[s]" as expressly provided for under the CDA.

I. The CDA expressly bars Banaian's claims against Bossidy and the other Re-Tweeters as they are "users" and not "information content providers" under the CDA.

a. Bossidy and the other re-tweeters are not "information content providers" under the CDA.

Under the CDA, an "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information produced

through the Internet or any other interactive computer service.” 47 U.S.C. § 230 (f)(3). There are no allegations in Banaian’s complaint that Bossidy, or any of the other re-tweeters, created or developed the hacked website itself or the original tweet which contained a photograph of the hacked website. See Compl, generally. Instead, the Complaint is clear that Winchester was the original creator/developer of the hacked website image and that Tillman created/developed the original tweet which contained the image. Compl. 5-6. Each of Winchester and Tillman may be considered an information content provider under the CDA. However, there are no allegations which support any inference that Bossidy or the other re-tweeters are “responsible, in whole or in part, for the creation or development” of the false content itself. See 47 U.S.C. § 230 (f)(3). As such, neither Bossidy, nor the other Re-Tweeters, are “information content providers”.

b. Instead, Bossidy and the re-tweeters are “users” under the CDA.

The *Barrett v. Rosenthal* court held that “Congress employed the term “user” to refer simply to anyone using an interactive computer service, without distinguishing between active and passive use.” 146 P.3d 510, 515 (2006). Specifically, the *Barrett* court held:

““User” is not defined in the statute, and 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). The standard rules of statutory construction, however, yield an unambiguous result. We must begin with the language employed by Congress and the assumption that its ordinary meaning expresses the legislative purpose. ... “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.”

Id. at 526.

Contrary to Banaian's position, Congress specifically envisioned a scenario wherein a user may actively share, re-tweet or otherwise engage with content created by information content providers. If Congress only meant to shield passive users from liability, there would have been no need for Congress to specifically prohibit treating any passive user as "the publisher or speaker of any information provided by another information content provider" as a "user who merely receives information on a computer without making it available to anyone else who be neither a "publisher" nor a "speaker"" and therefore such immunity wouldn't be required to be included in the statute. *Id.* at 527.

As such, Bossidy and the other re-tweeters were "users" of Twitter, an interactive computer service, under the terms of the CDA when they hit retweet on Tillman's tweet containing Winchester's content.

c. As Bossidy and the re-tweeters were users of an interactive computer service, they are immune from liability for the claims alleged by Banaian under the express language of the CDA.

As stated above, Bossidy and the other re-tweeters were "users" under the express terms of the CDA, while Winchester and Tillman are information content providers. There are no allegations in the complaint that Bossidy or the other re-tweeters are information content providers, as defined in the CDA. As such, Bossidy and the other re-tweeters, as users, cannot be "treated as the publisher or speaker of any information provided by information content provider", in this case the content created by Winchester and published on Twitter by Tillman. 47 U.S.C. § 230(c)(1). Further, under the CDA, "[n]o cause of action may be brought and no liability may be imposed under and State or local law" which would seek to treat Bossidy, who solely hit "re-tweet", as the "publisher

or speaker” of the content created by Winchester and published on Twitter by Tillman. Bossidy is therefore protected from liability under the claims alleged by Banaian which derive solely from the “re-tweet”. See *Teatotaller, LLC v. Facebook, Inc.*, 173 N.H. 442, 450-51 (2020) [holding that §230(c)(1) protects from liability a user, like Bossidy, of an interactive service, like Twitter, whom a plaintiff seeks to treat, under a state cause of action, as a publisher or speaker of information provided by another information content provider, like Winchester and Tillman]; see also *Mitan v. A. Neumann & Associates, LLC*, 2010 WL 4782771 (2010) [holding that reading § 230(c)(1), §230(f)(2)-(3) and §230(e)(3) “together, these provisions provide 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.”].

Conclusion

Defendant Shannon Bossidy respectfully requests that this Court affirm the trial court’s dismissal of the claims against her as barred by the CDA on the grounds that Bossidy was a user of an interactive computer service, that the content which Banaian alleges is defamatory was created and developed by other information content providers, namely Winchester and Tillman, and that the CDA provides immunity to Bossidy from the claims alleged by Banaian.

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Respectfully submitted,
Shannon Bossidy
By her attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this Memorandum of Law was served upon all counsel or parties through the Court's electronic filing system on this 14th day of June 2021.

/s/ Laura N. Carlier