THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2020-0496

DEBBIE BANAIAN

v.

ANN ELIZABETH BASCOM, ET AL

MANDATORY APPEAL

FROM A FINAL DECISION OF THE

HILLSBOROUGH COUNTY SUPERIOR COURT, NORTHERN DISTRICT

BRIEF OF DEFENDANT/APPELLEE

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STATUTES INVOVLED IN THE CASE

47 U.S.C. § 230
§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) [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 Act [47 USCS § 223 or 231], chapter 71

(relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code [18 USCS §§ 1460 et seq. or §§ 2251 et seq.], 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, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title [18 USCS § 1591];
(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, United States Code; 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, United States Code, 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.

CONCISE STATEMENT OF THE CASE

The Complaint of the Plaintiff/Appellant Debbie Banaian (hereinafter "Banaian") asserts the Defendant Caidan Winchester (hereinafter "Winchester") was a website usurper who hacked the Merrimack Valley Middle School website to post that Banaian was sexually perverted and desirous of sexual liaisons with students and their parents. Complaint, ¶¶ 2, 5. Further, Banaian's Complaint asserts that the Defendant Cameron Tillman (hereinafter "Tillman") was a website tweeter who photographed the defamatory alterations made by Winchester and tweeted the image over twitter. Id., ¶¶ 3, 6. Further, Banaian's Complaint asserts that John Does #1-10 and Jane Does #1-10 "re-tweeted" Tillman's tweeted image of Winchester's alteration to the website. Id., ¶¶ 4, 6. In her Complaint, Banaian, described the role of the re-tweeters as "…[t]heir role would be similar to the publication of defamatory newspaper content by having the newspaper delivered without charge to numerous members of the defamed person's community." Id., ¶ 6. Thus, Banaian's Complaint concedes the retweeters were uninvolved with the creation or development of the defamatory content and that the retweeters played no role beyond republishing.

The Defendant/Appellee Bryan Gagnon (hereinafter "Gagnon") is alleged by Banaian to be one of the so-called re-tweeters. Banaian's Complaint does not assert that any of the re-tweeters had any involvement with Winchester's alteration of the website or Tillman's tweeting of an image of same. Nor does Banaian's Complaint assert that the re-tweeters added or altered any content but rather asserts that they re-tweeted Tillman's tweeted image of Winchester's website alterations.

SUMMARY OF ARGUMENT

Persons who re-tweet or republish on twitter the content created by others are immune from civil liability for same under the Communications Decency Act (CDA), 47 U.S.C. § 230.

ARGUMENT

Under the CDA, "…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). The CDA defines an information content provider as a person "…responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Further, the CDA provides that "…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." 47 U.S.C. § 230(e)(3).

Banaian's arguments largely ignore that only parties who qualify as an "information content provider", as defined at 47 U.S.C. §230(f)(3), by virtue of their "creation or development of information", fall outside the scope of the broad immunity granted to providers and users (i.e. republishers) under §230(c)(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.

47 U.S.C. § 230(c)(1). Banaian has not demonstrated, nor could she, that the retweeters had involvement in the "creation or development" of the defamatory content involved herein. Thus, the retweeters do not qualify as information content providers and are

therefore within the scope of the broad immunity provided users (i.e. republishers) by §230(c)(1).

In a decision which carefully analyzed the statutory intent of the CDA regarding whether republishers qualify for "user" immunity under the CDA, the Supreme Court of California has held that the CDA provides blanket immunity for republishers. Barrett v. Rosenthal, 40 Cal. 4th 33,62-63, 146 P. 3d 510, 529 (2006). Contrary to the arguments of Banaian, the Barrett court noted that the limited legislative history with the CDA did not indicate why Congress included the term "user" in providing broad immunity under 230(c)(1). Id., 58. However, the Barrett court held that standard rules of statutory construction compelled the conclusion that "user" must be interpreted broadly to include someone who uses an interactive computer service including a person who republishes content created by another. Id., 63. The Barrett court noted that the Plaintiff was free under the CDA to pursue claims against the originator of the content. Id., 63.

Banaian's arguments herein were analyzed and rejected by the Barrett court. Id. Although not controlling law in New Hampshire, this court should find the Barrett decision to be well-reasoned and persuasive. The facts underlying Banaian's claims against the retweeters herein cannot credibly be distinguished in any meaningful way from the decision in Barrett, Id. If Barrett is followed herein, that compels an affirmance of the trial court.

Other courts have reached the same conclusion regarding republishers. See e.g. Mitan v. A. Neumann & Assocs., LLC, No. 08-6154, 2010 WL 4782771, 2010 U.S. Dist. LEXIS 121568 (D. NJ November 17, 2010) (A person who receives via the internet defamatory content and republishes same on the internet without involvement in the

creation or development of same is immunized from any civil liability under § 230(c)(1)).

In explaining that original authorship of the defamatory content was irrelevant for purposes of potential common law liability for defamation because all that was necessary was "publication" but that CDA immunity turned on whether the republisher was the person who created the content, Judge Thompson in Charles Novins, Esq. PC v. Cannon, 2010 U.S. Dist. LEXIS 41147 (D. NJ 2010), held

> …As multiple courts have accepted, there is no relevant distinction between a user who knowingly allows content to be posted to a website he or she controls and a user who takes affirmative steps to ***republish*** another person's content...it does not matter how Defendants ***republished*** the alleged defamatory statements-whether by email, website post, or some other method. The point is that all the Defendants in this case-with the exception of Cannon- acted as republishers of another person's information, and as such they are protected by the CDA. (emphasis in original)

In Cannon, Id., the Plaintiff sued nine individuals for posting defamatory content on the internet without asserting any of them were the author of the defamatory content. In holding that all Defendants would have had potential liability for defamation under the common law, the Cannon court recognized that the CDA distinguishes between "information content providers" who are responsible for creating content and mere "users" who do no more than republish the content of others and are immunized from any civil liability for same under the CDA. Id.

Retweeting content under a twitter handle such as "@pissedconsumer" has been held insufficient to satisfy the §230(f)(3) requirement of "creation or development of information" necessary to fall outside of the broad immunity granted republishers under §230(c)(1). Roca Labs, Inc. v. Consumer Op. Corp., 140 F. Supp. 3d 1311, 1320-21

(M.D. FL 2015)(Holding that republishing under such a handle is a far cry from the type of substantive content creation necessary to qualify as an information content provider).

Content which is illegal, obscene and sufficient to support a criminal prosecution is nevertheless within the broad civil immunity afforded by §230. GoDaddy.com, LLC v. Toups, 429 S.W.3d 752, 760 (Tex. Ct. App. 2014). Thus, the trial court was correct to reject Banaian's arguments below that her retweeter claims were beyond the scope of §230(c)(1) immunity because the conduct of the retweeters was alleged to be criminal in nature.

CONCLUSION

For purposes of immunity under §230(c)(1), retweeters must be construed as republishers who do not create or develop content as a §230(f)(3) information content provider. Retweeters are therefore entitled to broad immunity from civil liability under §230(c)(1). The trial court below was therefore correct to grant the dismissal motions of the retweeters. The trial court's rulings should therefore be affirmed.

REQUEST FOR ORAL ARGUMENT AND CERTIFICATIONS

Gagnon, through undersigned counsel, requests oral argument of 15 minutes.

Pursuant to Rule 26(7), undersigned counsel hereby certifies that this brief contains 2573 words and is in compliance with Rule 16(11).

Undersigned counsel hereby certifies that a copy of this brief has been delivered through the electronic filing system on June 3, 2021 to all registered e-filers.

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