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

DEFENDANT/APPELLEE ETHAN HOLLEN'S MEMORANDUM OF LAW IN LIEU OF BRIEF

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BRIEF STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Plaintiff/Appellant Debbie Banaian ("Ms. Banaian") appeals the trial court's dismissal of her complaint, as to Defendant/Appellee Ethan Hollen ("Mr. Hollen") and each of the other so-called retweeter defendants in this case. Ms. Banaian asks this Court to decide whether Mr. Hollen and the other retweeters are "users," pursuant to the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"), or are otherwise immune from liability, for retweeting an offending image of an altered website that was first created, then tweeted, by defendants other than Mr. Hollen or any of the other defendant retweeters.

In dismissing Ms. Banaian's complaint against Mr. Hollen and the other retweeters, the trial court found that "[r]etweeting another user's tweet is a form of republication: it does not involve the creation or the development of original content." Plaintiff's Addendum ("Pl.'s Add.") at 25. The trial court further held that Ms. Banaian's "entire defamation claim rests with the content originally tweeted by [Defendant] Tillman." *Id.* Mr. Hollen's act of simply retweeting another's creation is shielded from liability, by Section 230. *Id.*

ARGUMENT

The crux of Ms. Banaian's argument on appeal is that the legislative history of Section 230 should control, rather than the language of the statute itself. Plaintiff's Brief ("Pl.'s Br.") at *passim*. The trial court correctly found her argument elevating policy over statutory construction uncompelling. Pl.'s Add. at 32. As the court held, Ms. Banaian "raises only policy arguments about the usefulness or appropriateness of section 230 in

today's society," and while this is a topic that is the subject of scholarly debate, it is not one for the court to decide, because the plain language of the statute identifies users as immune from liability. *Id.*

Here, Ms. Banaian offers nothing more than policy arguments. Because the meaning of Section 230 is clear on its face, such policy arguments must fail.

I. Section 230 Is Clear on Its Face and Not Subject to Modification.

This case is one of statutory interpretation. "The interpretation of a statute is a question of law, which we review *de novo*." *Zorn v. Demetri*, 158 N.H. 437, 438 (2009)(citing *Correia v. Town of Alton,* 157 N.H. 716, 718 (2008)). "When interpreting a statute, we first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." *State v. Bickford*, 167 N.H. 669, 672 (2015) (citing *Pelkey v. Dan's City Used Cars*, 163 N.H. 483, 487 (2012), *aff'd*, 569 U.S. 251 (2013)). "We do not read words or phrases in isolation, but in the context of the entire statutory scheme." *Id.* "When construing federal statutes, we construe them in accordance with federal policy and precedent." *Id.* "Where the language of a statute is clear on its face, its meaning is not subject to modification." *Hutchins v. Peabody*, 151 N.H. 82, 84 (2004)(citing *Remington Invs. v. Howard,* 150 N.H. 653, 654 (2004)). "We will neither consider what the legislature might have said nor add words that it did not see fit to include." *Id.*

The language of Section 230 is abundantly clear on its face. Pursuant to Section 230, an "information content provider" is "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." 47 U.S.C. § 230(f)(3).

It is undisputed that Mr. Hollen neither created nor developed the image at issue in this case, whether in whole or in part, nor sent the initial tweet of same; he simply retweeted someone else's tweet. Pl.'s Add. at 24; 32-33. Therefore, pursuant to the plain language of Section 230, Mr. Hollen is not an information content provider.

An "interactive computer service" is "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 . . . ." 47 U.S.C. § 230(f)(2).

As the trial court found, and case law on point supports, Twitter falls within the statute's definition of interactive computer service. Pl.'s Add. at 22-23 (citing *Fair Hous. Council of San Fernando Valley v. Roomates.com LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016)).

In addition, "[n]o 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).

As the trial court found, and case law again supports, Mr. Hollen, along with the other retweeter defendants, is a user of Twitter, i.e., the user of an interactive computer service. Pl.'s Add. at 23 (citing *Barrett v. Rosenthal*, 146 P.3d 510, 527 (Cal. 2006)). Thus, he cannot be treated as the publisher or speaker of an image first created, then tweeted, by others.

Furthermore, "[n]o 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(c)(3).

Accordingly, Mr. Hollen is shielded by Section 230 and immune from liability for his retweet.

Ms. Banaian correctly notes that the court in *Barrett* performed a thorough analysis of the legislative history of Section 230, in concluding that the term "user" refers to anyone who uses something. Pl.'s Br. at 11. However, she argues that the statute's legislative history does not support the court's ultimate conclusion that Section 230 immunizes individual users, Pl.'s Br. at 12, suggesting that the court erred when it began its analysis by "resorting to standard statutory construction and used the ordinary dictionary meaning" of the term "user." Pl.'s Br. at 11-12.

To the contrary, the interpretation of a statute must begin with the language of the statute itself, and, where possible, that language must be construed according to its plain and ordinary meaning. *Bickford*, 167 N.H. at 672. Moreover, where a statutory term is in dispute, its dictionary definition is precisely where a thorough legal analysis should begin. "When a term is not defined in the statute, we look to its common usage, using the dictionary for guidance." *Franciosa v. Hidden Pond Farm, Inc.*, 171 N.H. 350, 359 (2018)(citing *K.L.N. Constr. Co. v. Town of Pelham,* 167 N.H. 180, 185 (2014)).

Here, the court properly construed the meaning of "user" based upon the standard rules of statutory construction and not on its legislative history. Because the plain and ordinary meaning of Section 230 is clear on its face,

the court could not and did not "consider what the legislature might have said nor add words that it did not see fit include." *Hutchins*, 151 N.H. at 84.

II. Plaintiff's Policy Arguments Are Misapplied and Must Fail.

Ms. Banaian further argues that the term "user" should be interpreted to mean libraries, colleges, computer coffee shops, and other companies that served as internet access points for people in the early days of the internet, when the internet was accessed, and websites used, in a much more limited capacity than they are today. Pl.'s Br. at 12.

In support of her argument, Ms. Banaian relies upon *Trainmen*, where the meaning of a federal statute was at issue. *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co*., 331 U.S. 519 (1947). Ms. Banaian cites to *Trainmen* to the extent the court held that, although titles or captions cannot be used to contradict the text of a statute, they can still be useful in resolving textual ambiguities and informing a court of Congress' intent. Pl.'s Br. at 15.

However, the *Trainmen* court further held that the failure of a statute's section heading to refer to every matter that its framers wrote into the text was not unusual. *Trainmen* at 528. Furthermore, "headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis." *Id.* Moreover, "matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles," and "[f]actors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Id.* at 528-529. Headings and titles "are but tools available for the resolution of a

doubt. But they cannot undo or limit that which the text makes plain." *Id.* at 529.

Here, as was the case in *Trainmen*, the meaning of the text of the statute is unmistakable on its face, rendering any interpretation based upon either the headings or titles not only unnecessary but inappropriate.

It is true, as Ms. Banaian argues, that statutes invading 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 evident." Pl.'s Br. at 16 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). Nonetheless, "[t]he rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." *Isbrandtsen Co., Inc. v. Johnson*, 343 U.S. 779, 783 (1952).

Here, of course, a clear statutory purpose contrary to the common law of defamation does exist. In fact, among the key benefits of Section 230, relied upon by providers and users alike, is the protection it affords from intermediary liability for defamation based on material posted by third parties.

CONCLUSION

For the foregoing reasons, Mr. Hollen is considered a user under Section 230, for retweeting material that was created and tweeted by others. Accordingly, Ms. Banaian's claim against him is barred by Section 230, and the trial court's dismissal in favor of Mr. Hollen should be affirmed.

Respectfully submitted,
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Dated: June 14, 2021

/s/Allen Lucas

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CERTIFICATION OF COMPLIANCE

The within Memorandum is in compliance with the word limitation set out in Supreme Court Rule 16(4)(b) and contains 1795 words.

/s/Allen Lucas

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was delivered, via the electronic filing system, to all registered e-filers, on June 14, 2021.

/s/Allen Lucas